Supreme Court, U.S.
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No. 99-1852

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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May 9, 2000

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QUESTIONS PRESENTED

I. Whether the petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—can be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and federal law, based upon his current and future civil and due-process constitutional rights.

II. Whether the petitioner's pending litigation against one member of the tobacco industry constitutes a legally enforceable interest, representing a case or controversy that continues to be ripe for adjudication and that, therefore, reflects a direct, substantial and immediate interest in the Master Settlement Agreement sufficient to merit being conferred standing to intervene.

III. Whether granting standing to the petitioner would *inter alia* yield the required judicial review of the Master Settlement Agreement's Immunity and Offset Clauses which, putatively, are—individually and in the aggregate—*ultra vires*, overly broad, complex, excessively ambiguous, and inconsistent with public policy.

IV. Whether granting standing to the petitioner would *inter alia* yield the required judicial review of the lack of an evidentiary justification for the Master Settlement Agreement's denial of future rights of youth—putatively, the class of individuals for whom the litigation had been filed—to seek redress.

PARTIES TO THE PROCEEDING

The petitioner is Dr. Sklaroff; initially, three individuals and thirteen organizations filed for intervention and, subsequently, these three individuals and four of the organizations filed an appeal. Subsequently, the other six parties (except Dr. Sklaroff) withdrew their appeals.

The plaintiff in the original litigation was Attorney General D. Michael Fisher, Esquire, who filed on behalf of the Commonwealth of Pennsylvania.

The defendants in the original litigation were:

Philip Morris Incorporated
R. J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
B.A.T. Industries, P.L.C.
The American Tobacco Company, Inc.
Brown & Williamson Tobacco Corporation
Lorillard Tobacco Company
Liggett Group, Inc.
United States Tobacco Company
The Tobacco Institute, Inc.
The Council for Tobacco Research-U.S.A., Inc.
Smokeless Tobacco Council, Inc.
Hill and Knowlton, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert B. Sklaroff, MD, respectfully petitions for a Writ of Certiorari to review the judgment of the Pennsylvania Supreme Court in this case.

OPINIONS BELOW

The opinion and order of the Court of Common Pleas (First Judicial District of Pennsylvania) was issued on February 26, 1999 [Appendix A]. The opinion and order of the Commonwealth Court of Pennsylvania was issued on August 10, 1999 [Appendix B]. The Pennsylvania Supreme Court order was issued on December 17, 1999 [Appendix C].

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. ¶ 1257 (a). "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .where any title, right privilege, or immunity is specially set up or claimed under the Constitution. . . ."

The Pennsylvania Supreme Court docketed its final order on December 20, 1999. This writ was filed in a timely fashion, pursuant to 28 U.S.C. ¶ 2101 (b), and it is refiled within 60 days thereafter, pursuant to the order of the Clerk on April 5, 2000 (citing numerous Rules of this Court).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Three Constitutional Amendments are cited: I ["Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances."]; V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . .]; XIV ["No state shall. . .deprive any person of. . .due process."].

Two CoP Constitutional concerns are cited [Articles I (sections 1, 20 and 25) and IV], plus state-level statutes.

The pivotal concern herein is that the very reason the original suit was filed has been **abrogated** in its settlement, and asserting standing through this mechanism—*parens patriae*—comports with the facts and the law of this case. The Master Settlement Agreement threatens the ability of youth to preserve their present and future rights as a "class." Dr. Sklaroff has a 9-3/4 year old son whom he would not want to start smoking cigarettes; Dr. Sklaroff wants to ensure the Tobacco Industry does not violate the Master Settlement Agreement, despite its limitations and vagaries.

STATEMENT OF THE CASE

The Master Settlement Agreement ["MSA"] reached by the Tobacco Industry ["TI"] was the largest civil litigation settlement in world history. In the Commonwealth of Pennsylvania ["CoP"], it was signed by the Attorney General ["AG"] who had a major role in its negotiation nationally. Two pending CoP cases [one in Superior Court and one in Commonwealth Court], however, illustrate that the AG has invoked prosecutorial discretion to avoid prosecuting alleged MSA violations by a TI member, Philip Morris Incorporated ["PM"]. Conduct exhibited during the past year has shown its obvious defects will protect the TI against prosecution for current and future behavior until/unless the deficient clauses therein have been amended or expunged, the goal of this suit.

This is an issue of **great** legal and public significance: can an agreement between an industry and government immunize that industry from any public interest lawsuit filed by any member of the public, even one intended to ensure the agreement is honored? Because the MSA was subject to judicial review and it will be subject to judicial oversight, it has been misportrayed merely as a contract; it must be subject to clarification by the AG prospectively—consistent with the AG's statements—through issuance of a stipulation.

The Commonwealth Court's minority opinion articulates the profundity of this error of law in the instant case, providing the foundation for this writ. Judge Kelley traced the origins of *parens patria* litigation, and he noted that the rights of youth had **not** been discerned by the trial court. Inasmuch as the MSA abrogates them, he concluded that blind approval of the MSA was a manifest error of law. Indeed, fundamental rights of unrepresented parties must be given **greater** weight than that of the settling parties.

No cogent rationale has been issued by any lower court for denying the petitioner standing in light of his multiple claims thereupon. Subsequent events demonstrate his legally enforceable interests regarding the MSA approval process. Because multiple legal challenges in state and federal courts pend currently against the MSA (such as that in Missouri), this Court should review decisions by the CoP (and other) state courts that involve *inter alia* issues of federal law.

This litigation represents the **only and last challenge** to the non-severable clauses in the MSA, arising in state courts and totally dissociated from any monetary claims (that characterize other lawsuits). Nevertheless, its filing does not eschew assessment of the MSA's profound fiscal impact, an issue that is fleshed-out more thoroughly by Judge Kelley.

I. Introduction

The MSA is an extraordinary pact, purporting to settle all the CoP's claims against the TI in exchange for its payment of, perhaps, billions of dollars and for its more responsible conduct. It is a Trojan Horse that is fundamentally flawed, for it contains two key provisions rendering it unlawful and its benefits uncertain: the AG improperly waives rights and claims, and the TI gains an Offset Clause that is *ultra vires*, unconstitutional and against public policy. It is perceivable as **collusion** between Big Tobacco and Big Government, inasmuch as removes the major mechanism by which the public health can be maintained: **the threat of litigation**.

Releases are to be provided by parties that were **not** named as parties in the Complaint; further, undefined present and future claims (by the CoP and others) are to be **waived**, making the MSA's benefits contingent and illusory. Instead of repairing these errors and ensuring the MSA was fair, adequate and reasonable, the Trial Court mistakenly denied Dr. Sklaroff standing, committing an **abuse** of discretion. Thus, this Court must **remand**, so as to allow Dr. Sklaroff to clarify the legality and scope of waiver and offset language; in the alternative, this Court must examine the MSA *de novo* and declare the subject provisions unlawful.

The remand is justified for many reasons. Dr. Sklaroff merits **standing** because he is a citizen, taxpayer, father, activist, physician, and litigant. He has pending litigation against PM, filed (as was the initial litigation) *parens patriae* (*inter alia*, to decrease the risk that his 9-3/4 year old son will become attracted to cigarettes). This case also perfectly fits the "Biester" Exception, a statute that was intended to empower citizen-taxpayers against governmental abuse of power. Indeed, no state court (primary or appellate) has yet addressed these criteria (individually or collectively), admittedly due to the "historic" nature of the MSA and its great fiscal implications. Yet, regardless of publicly-stated posturing intended to improve its image, the TI continues to commit crimes worldwide (*e.g.*, smuggling by B.A.T. in Great Britain and Philip Morris in Canada); it cannot be rendered immune from suits, regardless of one's perceptions of individual responsibility and multi-national corporations.

Dr. Sklaroff, functioning *per se*, submits argument to this Court that is necessarily incomplete. Nevertheless, he fears fundamental concepts threaten to **escape** judicial study. These profound concerns, individually and in the aggregate, create **precedent** that could then become the foundation for efforts of other entities to gain blanket indemnification for future conduct that, in turn, could trivialize the generally recognized capacity of people to petition their government and private entities for redress. They must not be avoided.

II. Procedural History

The AG initiated this action by filing a Complaint against the TI on April 23, 1997 seeking *inter alia* reimbursement for the CoP's tobacco-related Medicaid expenditures[1]. The action was brought as *parens patriae* ("on behalf of all its citizens"), but it did **not** include—or identify as parties—persons or entities functioning as municipalities & other local government units, private attorneys general, *qui tam* plaintiffs or taxpayers[2]. A national settlement was made public on November 16, 1998, and the CoP & TI submitted it to the Court requesting its approval in the form of a consent decree on November 23.[3] Dr. Sklaroff filed his Intervention Petition *pro se* on November 18 (joined by two individuals and two public interest organizations) for declaratory and injunctive relief. [The concerns were the Release and Waiver Clauses, plus the Indemnification and Offset Provisions.] A Revised Petition was filed on December 2 [Appendix D, which includes the Brief], joined by eleven additional organizations acting "on behalf of themselves and others similarly situated."[4] After Hearings (January 8 & 12, 1999), an Order was issued (January 13) entering a Consent Decree approving the MSA and denying the petitions to intervene.

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[1] This ten-count suit comprehensively elucidated the key factors that have contributed to this epidemic; it sought compensatory, punitive & other damages, civil penalties, and injunctive & other equitable relief. [CoP v. PM, No. 2443 (Philadelphia County Ct. C.P. April 23, 1997).]

[2] Thus, those aspiring to retain the right to pursue anti-tobacco litigation could not have known they could become Releasing Parties. [The TI imposed an 11/20/98 deadline for state-level concurrence, affording putative intervenors little time to explore this issue with their AGs.]

[3] Court approval was required because the MSA settles claims of minors [*n.b.*, repeated reference in the Recitals to Youth's alleged benefits]. Pa.R.C.P. 2039, 2064. Also, the CoP's citizens were represented as a group; class action settlements require court approval. Pa.R.C.P. 1714(a).

[4] A hospital group, an insurer, and the County of Allegheny also filed Complaints; the City of Philadelphia filed a brief. [All were filed prior to and orally argued during the Hearings, except for that of the insurer, which was filed late and dismissed due to lack of timeliness.]

As requested by the Settling Parties, the anti-tobacco activists—including Dr. Sklaroff—were denied standing. An appeal to Commonwealth Court was filed by Dr. Sklaroff (plus the two co-petitioners and four of the thirteen organizations) and Allegheny County.[5] Judge Herron issued his 59-page Opinion on February 26 [Appendix A]. Appeals to the Commonwealth [Appendix B] and the Supreme Courts [Appendix C] were denied, the latter without comment.

III. The Master Settlement Agreement

The Master Settlement Agreement[6] ["MSA"] was announced at a press conference led, in part, by the AG[7]. The national and statewide campaigns to achieve approval[8] led to the release of escrowed funds; the CoP received its first payment on December 31, 1999. The only impediment to approval outside the CoP was state-county conflict regarding division of the monies[9]; most have been resolved.

Its non-severable clauses[10] did not allow for citation of state statute to repair fundamental ambiguity of such vague phraseology; no precedent or procedural guideposts were cited to facilitate rudimentary interpretation thereof.

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[5] The petitioners were represented as a group by Alice Ballard, Esquire; subsequent appellate efforts were conducted *pro se*.

[6] "MSA" connotes both the model for the CoP and the document signed in the CoP; the two are identical, in the CoP and in all other localities.

[7] The MSA contained far less for public health (legally and fiscally) than the most-recently effectuated state-specific settlement (in Minnesota); thus, critical analyses thereof (including one from Dr. Sklaroff & Messrs. Barg & Godshall) were published in the lay and professional literature.

[8] "State-Specific Finality" was sought from 46 states (plus the District of Columbia) and five United States territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico and Virgin Islands).

[9] In most states, approval was perfunctory. In a few, hospitals and governmental subunits raised objections; smokers raised concerns in two. In New York, anti-tobacco activists led a serious, focused challenge.

[10] The TI cannot claim **any** "non-severable" clause would, if severed, suddenly render it unable to conduct their businesses in the CoP, inasmuch as such constraints do not exist in the first four settling states.

a. Releasing Parties and Released Claims

The MSA waived and released claims on behalf of these "Releasing Parties": the CoP (plus its agents, officials, representatives, agencies, departments, commissions, divisions and subdivisions) and "persons or entities acting in a *parens patriae*, sovereign, quasi-sovereign, private attorney general, *qui tam*, taxpayer or any other capacity." ["II (pp)"][11]

Releasing Parties were included:

(A) to the extent that any such person or entity sought relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or

(B) to the extent that any such entity (as opposed to an individual) sought recovery of health-care costs (other than premium or capitation payments for the benefit of present or retired state employees).

Released Claims gave an unprecedented blanket-release, encompassing all torts filed ["II (nn)"] for claims arising from conduct, acts or omissions, directly or indirectly:

(1) in the past "(including any damages incurred in the future arising from such past conduct, acts or omissions), those Claims. . . based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products."

(2) in the future "only those monetary Claims. . . based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business. . . ."

The MSA did not define "non-business" business.

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[11] [Bracketed References are to excerpts from the MSA.]

b. Offset

The "Settling States' Release, Discharge and Covenant" ["XII (b)"] granted this "litigating releasing parties offset":

> If a releasing party (or any person or entity enumerated in subsection II (pp), without regard to the power of the Attorney General to release claims of such person or entity) nonetheless attempts to maintain a Released Claim against a released party, such released party shall give written notice of such potential claim to the attorney general of the applicable Settling State within thirty days of receiving notice of such potential claim. . . .The released party may offer the release and covenant as a **complete** defense.
>
> If it is determined at any point in such action that the release of such claim is unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim), . . .
>
> (1) the released party shall take all ordinary and reasonable measures to defend the action fully. The released party may settle or enter into a stipulated judgment with respect to the action at any time in its sole discretion, but in such event, the offset described in subsection (b)(2) or (b)(3) below shall apply only if the released party obtains the relevant Attorney General's consent to such settlement or stipulated judgment, **which consent shall not be unreasonably withheld**. . .
>
> (2) . . . .A. In the event of a settlement or stipulated judgment, [it] shall give rise to a continuing offset as such amount is actually paid against the full amount of such original participating manufacturers' share. . .of the applicable Settling State's Allocated Payment until such time as the settled or stipulated amount is fully credited on a **dollar-for-dollar** basis." [emphasis added]

c. Scope

The MSA was to be effectuated "to the full extent of the power of the signatories to release past, present, and future claims." Thus, "Releasing Parties" did not include parties to the extent the AG lacked power to release their claims[12].

Nevertheless, enforcement power was centralized by the "Intended Beneficiaries" clauses [XVIII (p)], blocking non-governmental plaintiffs from obtaining injunctive relief[13].

IV. Dr. Sklaroff and The Coalition for a Tobacco Free Pennsylvania

The Coalition for a Tobacco Free Pennsylvania has been, for two decades, the CoP's only statewide democratically-governed organization of anti-tobacco activists. Its work is submitted annually to the Centers for Disease Control and Prevention ["CDC"] by the CoP Health Department in conjunction with mandated reportorial responsibilities.

The AG announced formal filing of the litigation against the TI while standing alongside the Coalition President. The Coalition was unable, however, to provide consultation during or achieve an impact upon any settlement discussions.

Coalition members noted with dismay that the MSA's above-detailed releases and offset did not appear in the agreements effectuated in the first four settling states (Mississippi, Florida, Texas & Minnesota). The Coalition and certain members thereof—plus the Coalition President and Vice President—ultimately filed for Intervenor Status. As a direct result, some key members resigned therefrom.

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[12] Legislation based on Exhibit T ("Non-Participating Manufacturers") threatens to do that, for CoP HB-445 affords "stealth immunity" by omitting reference to the qualifying clause while affirming the immunity. Dr. Sklaroff's testified accordingly before its Courts Subcommittee.

[13] "No portion of this Agreement shall provide any rights to, or be enforceable by, any person or entity that is not a Settling State or a Released Party. No Settling State may assign or otherwise convey any right to enforce any provision of this Agreement."

Dr. Sklaroff has served twice as the Coalition Secretary. Its efforts regarding this issue[14] were consistent with policies of the Pennsylvania ["PA"] Society of Internal Medicine, as implemented by Dr. Sklaroff (its immediate-past President).

Thus, although Dr. Sklaroff has acted alone during the past year, his goals are consistent with Coalition policies.

V. Dr. Sklaroff's Challenge in Pennsylvania

Dr. Sklaroff and the other activists sought Intervenor status "to prevent a wholesale denial of due process to any and all [such as themselves] who might bring public interest litigation." They viewed this as their only opportunity to challenge egregious sections of the MSA[15].

They condemned slight-of-hand releases that effectively immunized the TI from legal liability. The mere existence of the Offset would prompt the CoP to intervene in defense of the TI because: (i) in the event of petitioner's success, the litigating releasing parties offset provisions would divert allocated payments from the CoP to the petitioner; (ii) the CoP plaintiffs would therefore have a financial interest in tobacco defendants' prevailing against the petitioner, which interest would be directly adverse to the petitioner's interest; and (iii) the CoP plaintiffs' intervention in petitioner's litigation would proceed without objection from the TI.

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[14] The Coalition continues to lobby for use of MSA monies that complies with the CDC's "Best Practices" Guidelines. In Pennsylvania (unlike other states), health initiatives are to be supported—consistent with goals of the initial lawsuit—focusing on Medicaid. Yet, the Coalition strives to maintain a 25% tithe for tobacco prevention and cessation programs, even as others ignore tobacco and youth. It opposes a fiscal free-for-all, as evidenced before the CoP's House Appropriations Committee on March 16, 2000. The Dean of the University of Pittsburgh Medical School would fund the Human Genome Project (well-funded and almost complete) claiming this would help identify potential nicotine addicts; Dr. Sklaroff immediately testified this was "quite a stretch," medically.

[15] They obtained *seriatim* a Rule that scheduled a Hearing in Motions Court before Judge Mary D. Colins and an Order that transferred the proceedings to Judge John W. Herron, despite CoP/TI opposition.

The Settling Parties' proposed statements of fact were not disputed; instead, characterizations therein were rejected. Appended to their brief were detailed descriptions of cases that have been brought both in the CoP and elsewhere which, if filed after approval of the MSA, would be subject to dismissal (*n.b.*, "release" or "intended beneficiaries" clauses) or which, if successful, would recover not from the TI defendants but from the CoP's allocated funds (*n.b.*, offset).

The Prayer for Relief sought approval of the MSA to be contingent upon severing all these concerns regarding rights of the Activists from any and all provisions of the MSA. Instead of trying to block implementation of the MSA, the intent was primarily to stop the CoP from mandating Activists forfeit their civil rights at the TI's insistence.

VI. The Trial Court Hearings and Opinion

During the Hearings, the Settling Parties opposed intervention and asked the Court to approve the MSA. They lauded both its unprecedented fiscal dimensions and its potential sociological impact. Meanwhile, Dr. Sklaroff introduced evidence demonstrating his interest in this case, including his extensive history of action against the TI as a citizen and taxpayer of the CoP. He also pointed out to the Court the problems with the scope and operation of the Release and Offset language; absent standing, however, he noted inability to address all other constitutional problems.

The Settling Parties didn't dispute his interpretation of the MSA. The AG averred he lacked power to release the claims of taxpayers and private attorneys general, and he agreed Dr. Sklaroff had brought his petition in good faith. Unlike the AG, the TI did not state its position, intent or understandings regarding the Release and Offset clauses. Neither Settling Party offered any explanation or estimate as to the value of the released claims (past, present or future), the *quid pro quo* for dealing with a TI mired in litigation.

More than a year hence, these issues remain unresolved.

More than a year hence, other issues remain unclear[17].

The Opinion noted the MSA's terms were complex "with distinct qualifiers and limitations." **It never analyzed its fairness, reasonableness and adequacy.** The Opinion concluded the Petitioners—including Dr. Sklaroff—lacked a Legally Enforceable Interest ["LEI"] that would empower them to question the Release & Offset[18]. Yet, it didn't cite (let alone discuss) the Appendix to the Petitioners' brief, which listed a multitude of examples of such cases.

On the one hand, it recognized "this court is not concerned with any technical defects in the activists'. . . petition (such as its failure to attach a pleading as required by Pa.R.C.P. 2328)." On the other hand, the existence of this "curable technicality" yielded the view that, absent a filing, the petitioners lacked a LEI and, thus, lacking standing.

The Petitioners had cited their concerns with sufficient precision to convey what would be subject to future lawsuits. This was deemed apt because the word "may" (a qualifier) and not the word "must" was the operational term [Pa.R.C.P. 2327(4): "the determination of such action **may** affect any LEI of such person, whether or not he may be bound by a judgment in the action"]. This was felt to reflect the need to protect rights that could be invoked for the MSA's lifetime.

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[17] As an example, note this exchange (N.T., 1/8/99, page 58):

Herron: Does the MSA in any of its provisions prohibit the use of seeking to enjoin certain conduct or activity assuming one would have a right or standing to bring such injunction?

Attorney: Assuming that you get over any hurdles if they are asserted with regard to the MSA and you can bring a claim, and I can ask my colleagues again, but I do not believe that there are prohibitions on that.

Herron: All right. I'll wait for that answer

[18] The Activists failed to cite "a single case in their petitions or memoranda to assist the court in determining whether they have, in fact, asserted a LEI." .... The Activists cited "to no concrete harm other than the potential (but as yet undetermined) effect of the release." .... Allegations that future claims would be subject to the MSA were termed "hypothetical." .... "On the present record, the petitioners fail to present an actual case or controversy—a LEI—ripe for disposition."

The Opinion noted the CoP had asserted it did not wish to interfere with the Petitioners' rights, but it also found "discussion of their substantive constitutional rights would be an advisory opinion[19] without legal effect." It ignored the Petitioners' warning that the TI could take advantage of the inhibitory impact of this uncertainty on "disarmed" activists.

It cited PA Supreme Court precedent that concluded that "the exact boundaries of the LEI limitation [of Pa.R.C.P. 2327(4)] are not clear. . .[and its application in a particular case] "calls for the careful exercise of discretion and a consideration of all the circumstances involved." These asserted interests were to be analyzed "within the context of applicable rule and precedent"; this self-imposed task, however, was inexplicably abandoned thereafter, and the presumed absence of a LEI was deemed fatal to the petition.

Thus, responsibility for interpreting the MSA was punted elsewhere ["at another court, at another time"]. This posture afforded the Opinion a "NIMBY" ["Not In My Back Yard"] quality that recurred when Judge Herron refused to address an alleged violation of the MSA by the TI [*vide infra*], precisely the LEI he had previously deemed indispensable.

"The effect of the MSA release provisions—if any—cannot be determined except in the context of that future proceeding. At that point, they would have ample opportunity to demonstrate why the release provisions do not apply." It failed to note that the MSA contains no provision establishing procedures for any such intervention.

Ultimately, it cited the need to balance protection of individual rights against avoiding unnecessary restraint upon the AG in performing legitimate duties; the gravaman was felt to be whether "the alleged harm is at best conjectural."

The Opinion noted that, "it is thus not entirely clear whether the Activists object to the offset provisions as a denial of their constitutional right of access to the courts or if they assert it is objectionable as 'bad policy.' "[20]

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[19] No "advisory opinion" had been requested, either orally or in the brief.
[20] Activists had clearly asserted the former, without denying the latter.

This was viewed as inherently political and the recourse advised for disputes regarding policy—not law—was, presumably, *inter alia* to work against the AG's reelection.

Finally, the Opinion eschewed any consideration of certifying a class [Pa.R.C.P. 1702] due to inherent potential to delay the proceedings [footnote #42]. Haste was preferable, even if precedents such as the following were to be ignored.

In 1995, class action litigation was viewed broadly when a district court was forced to make Rule 23 rulings [In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation. 65 Fed 3rd 768]. And in 1996, "inclusion of future claims" was felt to raise serious fairness concerns regarding claims for asbestos-related personal injury or wrongful death." Georgine *et al* v. Amchem Products, Inc. *et al.*, 83 Fed 3rd 610. Just as in the MSA, this settlement didn't afford victims any delayed opt-out rights.

The AG has mischaracterized this serious legal challenge as a trivial assertion of non-existent rights intended to block a comprehensive settlement benefiting the public health[20]. He has turned his sword against those he had sworn to protect[21]. The other activists withdrew, despite the facts that these MSA monies were not yet available, that the appeal filed by Allegheny County was pending, and that the TI has donated $50 million for legal costs that totaled ~$10 million. He pledged to enforce, the TI promised to obey; **neither** has.

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[20] Societies often maintain inertia that seeks to preserve their institutions, no matter how onerous. Thus, individuals are often overwhelmed by the sheer size of a menacing corporation, and tend to capitulate. Cynics refer to "all the democracy money can buy," but altruists point to the inability to "buy happiness." Intervenors are "irresistible forces" encountering the "immovable objects" in the forms of Settling Parties. It is the role of government—and, in this instance, the judiciary—to rectify these forces.

[21] In a March 1 letter, the AG threatened to force the activists to pay legal costs plus 6% per annum of $11.2 Billion. This gross intimidation threatened to obstruct justice by denying individuals constitutional access to the courts, free speech, civil rights, and equal application of the law, but the AG said it was a "friendly reminder." As a result, the other activists discontinued their appeals, rationalizing this "strategic retreat" by arguing the lower court opinion would facilitate future enforcement.

VII. Philip Morris Financing of Wawa Billboard Ads

In April, 1999, Wawa Food Markets initiated a billboard advertising campaign financed by PM, a "manufacturer sponsored promotion." A public outcry prompted the AG to exert pressure on Wawa; the billboards were then removed.

Dr. Sklaroff filed litigation intended to fine PM for this MSA violation and to enjoin PM from recidivism, but PM claimed immunity under the MSA. Sklaroff v. PM. [Appendix E]. The billboards returned in December, and another retailer (Sheetz) emulated this act in Western Pennsylvania. Dr. Sklaroff filed litigation intended to force the AG to enforce the MSA, but the AG claimed Dr. Sklaroff had no standing to do so. Sklaroff v. Fisher. [Appendix F].

Thus, a dangerous precedent has been established and validated in the CoP; a member of the TI can violate the MSA's "Third Parties" clause and escape enforcement. Yet, although this scenario was predicted and occurred, the lower court refused to allow the record to be supplemented (during reconsideration) with data documenting this conduct. **For now, the TI is confident the AG will not enforce the MSA, even as the public blindly assumes otherwise.**

ARGUMENT SUMMARY & REVIEW STANDARDS

It is an abuse of discretion to deny Dr. Sklaroff standing and to refuse to analyze and weigh the merits of the MSA[23]. Dr. Sklaroff has standing as a Taxpayer according to the Biester guidelines [487 Pa. at 443, 409 A.2d at 851 (1979)] and due to his direct, substantial and immediate interest in the outcome of the MSA approval process; his standing is both personal and professional, mutually exclusive from the AG's.

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[23] Dr. Sklaroff, as the Petitioner/Appellant, is in a position to re-inspire a dormant pursuit. The capacity for public health entities to pursue the commonweal is on life-support; if it succumbs, it will become virtually impossible to aid the general public. The MSA is known to be deficient, but many of Dr. Sklaroff's colleagues view this legal fight as quixotic.

The Court is **obligated** to examine, consider and study the MSA, including the terms of Release and the impact of the Offset. According to court rules, such analysis is unambiguously required for settlements of class actions and claims for minors, incompetents and incapacitants.

Had the Court performed its duty, it would have found the Release and Offset clauses were improper and unlawful. The Release purports to waive claims that cannot be waived, and the Offset gives away what the AG has no authority to relinquish. It would also have found that the MSA improperly limits the fundamental capacity of citizens to seek injunctive relief. This matter is currently "ripe," and Dr. Sklaroff has Legally Enforceable Interests therein, amply manifest in two CoP courts (Commonwealth & Superior).

The AG must **stipulate** what he has admitted; he has denied he can indemnify, and he has averred he would limit the ability to invoke the offset provision indiscriminately. The essential remedy is remand to the Trial Court to establish that Dr. Sklaroff and other Petitioners have LEI's, thereby affording an opportunity to acquire the necessary declaratory relief. In the alternative, this Court could itself act in its primary jurisdiction to declare the release and offset clauses *ultra vires*, stricken, or satisfactorily modified. The chance to study its "fairness, reasonableness and adequacy" will **never** again arise, either in the CoP or nationally.

The question of intervention is a matter within the sound discretion of the trial court and, unless there is a manifest abuse of such discretion or an error of law was committed, its exercise will not be interfered with on review. Keener v. Zoning Hearing Board of Millcreek Township, 714 A.2d 1120 (Pa. Cmwlth. 1998) See also, Wilson v. State Farm Mutual Automobile Insurance Company, 512 Pa. 486, 517 A.2d 944, 947 (1986). **Discretion is abused if**, in reaching a conclusion, **the law is overridden or misapplied or the judgment exercised is manifestly unreasonable** or is the result of partiality, prejudice, bias, or ill will. Van Dine v. Gyoriska, 522 Pa. 122, 713 A.2d 1104 (Pa. 1998).

The scope of review of a question of law is plenary. Wojdak v. Greater Philadelphia Cablevision, Inc., 550 Pa. 474, 707 A.2d 214 (1998); Tomaskevitch v. Specialty Records Corporation, 717 A.2d 30 (Pa. Cmwlth. 1998). When the issues on appeal present questions of law, the court's scope of review is plenary. Skipworth by Williams v. Lead Industries, Inc., 547 Pa. 224, 690 A.2d 169 (1997).

Dr. Sklaroff must be granted standing because he is a taxpayer and because has legal and equity interests justifying intervention (*i.e.*, that are substantial, direct and immediate). He has an interest in the outcome of the suit that surpasses the common interest of all citizens in procuring obedience to the law, but which is asserted in the present/future public interest.

I. The petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—should not be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and federal law, based upon his current and future civil and due-process constitutional rights.

Both the judicial and executive branches of CoP government have concluded Dr. Sklaroff merited standing based upon facts and averments **identical** to those herein. Commonwealth Court granted Dr. Sklaroff standing (with the organization he served as President, the PA Society of Internal Medicine)—pursuant to efforts to reverse merger of PA Blue Shield and Blue Cross of Western PA[24]—because he was elected (by his peers) to be a Corporate Member of Blue Shield and was a provider (and insured) thereof[25]. These facts indisputably elevated him over the "public."

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[24] This would be the CoP's largest health care organization consolidation.

[25] He alleged they have a monopoly/monopsony and have abrogated their Social Mission, a pattern of conduct that has intensified from 1996-2000.

They proved he had a "direct" interest in the outcome of this matter. Philadelphia County Medical Society, *et al.* v. Pennsylvania Insurance Department. No. 3309, C.D. (Pa.Cmwlth. 1996). This view was sustained by the CoP Insurance Department, pursuant to an Order issued on January 14, 1999[25]. Application of Medical Service Association of Pennsylvania d/b/a Pennsylvania Blue Shield *et al.* Docket No. MS96-04-098. It remains operational.

The CoP recognized the expertise & experience afforded by the activists throughout the City Hall proceedings, in the courtroom and outside in the corridor; the AG "needs" them.

Thus, the activists merit being granted full standing to address the MSA at this time, just as the PSIM was granted full standing to address the Blues consolidation. Dr. Sklaroff cannot exert the interests of all activists; rather, he anticipates remand would trigger a process comparable to that which occurred with regard to the Blues: the lower court would issue a public invitation to other putative intervenors.

a. Dr. Sklaroff has the capacity to seek relief on behalf of and/or generally applicable to the general public by filing a taxpayer lawsuit.

Dr. Sklaroff also warrants standing under the Biester taxpayer exception. Under this exception, the taxpayer must show: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of expenditures beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no existence of other persons better situated to assert the claim. Biester, 487 Pa. at 443, 409 A.2d at 851 (1979).

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[25] The PA Society of Internal Medicine ["PSIM"], Dr. Sklaroff and the PA Medical Society are full parties before the PA Insurance Department, which initiated the process of holding full adjudicatory adverse-party public hearings in March, 1999; two other entities are *amici curiae*.

The relevant public policy ensures taxpayers are able to seek judicial oversight. [Biester, 409 A.2d at 851 n.5.]

Commonwealth Court granted standing to "taxpayers or organizations that represent Philadelphia taxpayers" at zoning hearings who wish to discuss billboards. Society Created to Reduce Urban Blight (SCRUB) *et al.* v. Zoning Board of Adjustment of the City of Philadelphia *et al*. (4/5/99). The pending issue involved more than a government contract, just as is the case with a court-approved lawsuit settlement; thus, the settling parties can't finesse dealing with intervenors.

Unaddressed but recognized were two additional reasons for granting standing: "zone of interest" and "private AG." The former cited Ken R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1966) & Jefferson Bank v. Newton Associates, 686 A.2d. 834 (Pa. Superior Ct. 1966).

Regarding the Private Attorney General issue, Jones v. Muir, 511 Pa. 535 A.2d 855 (1986) was cited. This party was defined as one "who may not carry a direct, substantial or immediate interest in the subject matter of the litigation, [but who] may be conferred with standing because he shares a common interest with citizens or taxpayers in general."

A recent (4/3/2000) ruling in San Diego, California[27] noted that standing as a private-AG was readily and fully available under the "Business and Professions Code." Daniels *et al* v. Philip Morris, *et al*, [SDSC Case # 719446].

Biester has been broadly applied. Consumer Party of Pennsylvania v. Com. of Pennsylvania, 507 A.2d 323 (Pa. 1986); Sprague v. Casey, 550 A.2d 184 (Pa. 1988); Rizzo v. City of Philadelphia, 528 A.2d 1128 (Pa.Cmwlth. 1990); League of Women Voters of PA *et al* v. Commonwealth of PA *et al*. 692 A.2d 263 (Pa.Cmwlth. 1997); Building Industry Ass'n v. Manheim Township. 710 A.2d 141 (Pa.Cmwlth. 1998).

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[27] "Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." § 17200, *et seq.*[27]. Comparable statutes exist in the CoP, such as the UTPCPL (73 P.S. § 201-4) that authorizes the AG to seek injunctive relief to enjoin fraudulent trade practices.

Dr. Sklaroff meets the five-prong Biester exception, noting demonstrated ability to utilize all available resources to accomplish profoundly important goals and objectives.

The first prong has been borne out by the chronology of events; **public health facets of the CoP's settlement of this lawsuit with the TI would have gone unchallenged but for Dr. Sklaroff's challenge**. Dr. Sklaroff *inter alia* wrote and filed this suit; recruited endorsements from two organized medicine entities[27]; and strained long-term personal relationships as he continues to pursue this public-interest Appeal.

As to the Second prong, **those directly, immediately and substantially affected by the settlement thereof (the CoP and the TI) are beneficially affected and aren't inclined to challenge the agreement or police future behavior**. To the contrary, the Settling Parties seek approval of the MSA that will thereby curtail the CoP's monitoring. Certainly, the TI lacks a record of trust over the decades (*n.b.*, publication of embarrassing scientific "data") and years (*n.b.*, publication of damning internal memos); rogue corporations do not abandon patterns of misconduct, thus requiring vigorous regulation[28].

Legislatively, the CoP has earned a poor grade in the annual state-by-state assessment issued by the CDC, exemplified by its failure in 1996 to implement a state-wide Youth Access Program (despite lobbying from the Coalition).

Administratively, the CoP Health Department has much unfinished business, such as issuance of formal regulations implementing the **1988** Clean Indoor Air Act and release of a **half-decade remote** Youth Survey (encompassing knowledge, attitudes and behavior). Presently, attention has been shifted (by the public health community, legislature and Governor) towards how tobacco settlement monies should optimally be spent; although Dr. Sklaroff has provided testimony in that regard, only he pursues the ongoing concern with repair of fundamental defects in the MSA that others (who may privately acknowledge his veracity) have abandoned.

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[27] The PSIM & The Philadelphia County Medical Society endorsed it.

[28] The CoP has shown little interest in probing such abuses in the past.

As to the third prong, **judicial relief is appropriate**, inasmuch as the dispute between the CoP and the TI was pending in court and, further, that the Settling Parties submitted the MSA to the court for its formal approval. Thus, the Trial Court must assess prospectively the propriety of the document it will administer thereafter[29].

As to the fourth prong, **no procedure is now available to Dr. Sklaroff through which he might directly challenge implementation of the MSA**. Even were he to win his other two cases, the MSA's onerous clauses would not be disturbed.

As to the fifth prong, **no other persons/entities are better situated to assert this claim**. Dr. Sklaroff is a medical oncologist, treating tobacco-diseases on a daily basis; he has devoted his professional life towards anti-tobacco pursuits[30].

Thus, Dr. Sklaroff meets the five-prong Biester test, and he has LEI's that afford him the right to intervene. He satisfies these criteria in ways identical to those previously sustained as having justified being granted party status. He wants only what exists in the first four settling states: Pennsylvanians should now be empowered to *improve* problematic clauses in the MSA, and the *only* way they will be able to do so will be by pursuing the instant litigation through the courts. He has standing because, otherwise, neither government nor activists will be able to ensure the TI obeys the law (generally) and the MSA (specifically)[31].

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[29] The Settling Parties failed to identify any facet of the MSA they admit must be subject to prior judicial approval; this is predictable for—if they had their way—it would be rubber-stamped without **any** need for review.

[30] These started during his medical oncology fellowship at the Memorial Sloan-Kettering Cancer Center (1977-1979) and have continued unabated in all available forums (public and professional) since that time.

[31] The Settling Parties act as if they have suddenly discovered the "emergency" of the tobacco abuse epidemic (tenaciously, loudly and robustly ignored by the TI over the decades). Evidence of public health damage emerged in the medical/lay media more than a half-century ago, led to annual reports issued by the U.S. Surgeon General starting in 1964, and reached generalized public consciousness during 1994 House and 1998 Senate Hearings. And the Government must recognize that the need to fund Tobacco Control isn't contingent on the MSA's existence.

b. In addition to his Wawa cases against PM and the CoP AG, Dr. Sklaroff can articulate two causes-of-action based upon tax-related implications of the MSA justifying a taxpayer suit.

These causes-of-action are as follows. One would block the Tobacco Industry from making settlement monies tax-deductible. The second would block the Tobacco Industry from invoking Section X ["Effect of Federal Tobacco-Related Legislation"] to invoke "a continuing dollar-for-dollar offset" against the annual payments by the TI to the state were Congress to increase excise taxes, as the MSA depicted in complicated legal language.

c. Dr. Sklaroff has the legal right to seek relief on behalf of and/or generally applicable to the general public by filing generic litigation.

The Petitioners' Brief cited numerous causes of action—both in the CoP and throughout America—which could be and have been filed in the CoP against the TI. Dr. Sklaroff could serve as the plaintiff in these cases, all of which have passed muster as causes-of-action, or in a consultative role.

Cited are the following cases: Mangini v. R. J. Reynolds Tobacco Company, *et al.*, 875 P 2d 73 (Cal. 1994); Allegheny General Hospital, *et al* v. Philip Morris, Inc., *et al.*, Court of Common Pleas of Allegheny County, Civil Division GD No. 98-018956 (1998); Reverend Jesse Brown, *et al.* v. Philip Morris, Inc., *et al.*, U.S. District Court for the Eastern District of PA, Civil Action No. 98-5518; Sweeney, *et al.* v. American Tobacco Company, *et al.*, Court of Common Pleas of Allegheny County, No. 98-16226; McNamara, *et al.*, Court of Common Pleas of Montgomery County No 98-13501 [removed to federal court]. Additional cases dealing, for example, with nicotine addiction and with antitrust matters might also prompt acquisition of input from a physician-activist whose work is distinct from the "public."

d. Constitutional Concerns.

Blocking Dr. Sklaroff and the Activists from intervening denies them due process (under the 1st, 5th and 14th Amendments) and equal protection (under the 14th Amendment and the PA Constitution's Declaration of Rights).

In the latter (Article I), for example, Section 1 deals with the Inherent Rights of Mankind, Section 20 deals with the Right of Petition, and Section 25 deals with Reservation of Powers in People. The class action and civil rights of many future putative litigants have been violated in this matter.

As anticipated, a federal court filing by PM on 3/31/99 raised the MSA as an affirmative (11th) defense for present and future actions. Blue Cross/Blue Shield of New Jersey, Inc. *et al.* v. Philip Morris, Inc. *et al.*, Civil Action # 98-3287 US District Court for the Eastern District of New York. PM also invoked the MSA in its Preliminary Objections to the current filing against the Wawa Billboard Advertising.

II. The petitioner's litigation against one member of the tobacco industry constitutes a legally enforceable interest, representing a case or controversy that continues to be ripe for adjudication and that reflects a direct, substantial and immediate interest in the Agreement sufficient to merit being conferred standing.

The litigation against PM for having financed the Wawa Billboard Advertisements was opposed by PM due *inter alia* to the MSA's immunity clause. It was viewed, however, as moot by the Trial Court because the billboards had been removed. Although the ads reappeared prior to final adjudication of the case, the judge inexplicably refused to reconsider. Therefore, Wawa and PM have clearly not foresworn this conduct.

This observation is supported by two additional facts. First, Sheetz has pursued comparable behavior in Western Pennsylvania, despite the AG's jawboning.

Indeed, the TI's financing of billboard advertising is a national phenomenon, but the CoP AG has failed to attempt to enforce the MSA's clear, multiple proscriptions thereupon, particularly as they relate to contractual obligations.

In addition, multiple additional violations of the MSA's restrictions on youth advertising were reported to his office, raw information that would be easy to confirm and prosecute. This is also why the AG has been directly sued; he must be forced to fight the TI, even as he blocks others from doing so. **Thus, the Wawa case is, has been, and will remain ripe.**

One cannot depend on potential litigation to settle key MSA-related issues, letting controversies remain unresolved; for example, if the MSA waived all citizens' rights to trial by jury or to retain counsel, the issue *sui generis* would be ripe.

III. Granting standing to the petitioner would *inter alia* yield the required judicial review of the Master Settlement Agreement's Immunity and Offset Clauses which, putatively, are—individually and in the aggregate—*ultra vires*, overly broad, complex, excessively ambiguous, and inconsistent with public policy.

The Court was required to weigh the merits of the MSA to ensure it was fair, reasonable and adequate. In re: Washington Public Power Supply System Sec. Litig., 720 F.Supp. 1379, 1387 (D.Ariz. 1989), aff'd Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir. 1992, *cert. Denied*, 506 U.S. 953.

Its failure to do so was a manifest abuse of discretion and error of law. The AG brought this action in his official and representative capacity "pursuant to his authority under 71 Pa.C.S. 732-204, 73 Pa.C.S. 201-204 and 73 Pa.C.S. 201-208 and in *parens patriae* on behalf of the citizens of Pennsylvania. including its children and adolescents, to protect their health and welfare, and to recover damages the Commonwealth **and its citizens** have sustained as a result of the unlawful and concerted action of the defendants, as well as injunctive relief."

a. The Trial Court failed to analyze the MSA.

The court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights. As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a "range of reasonableness." H. Newberg, Newberg on Class Actions, 5610b (1977) [*See also,* Buchanan v. Century Fed. Sav. & Loan Ass'n, 259 Pa.Super. 37, 393 A.2d 704, 709 (1978); *also see* Prince George Center, Inc. v. U.S. Gypsum Co. 704 A.2d 141 (Pa.Super. 1997).]

In evaluating such settlements, CoP courts are **required** to consider many factors, even if intervenors don't raise them:

(1) the risks of establishing liability and damages,
(2) the range of reasonableness of the settlement in light of the best possible recovery,
(3) the range of reasonableness of the settlement in light of all the attendant risks of litigation,
(4) the complexity, expense and likely duration of the litigation,
(5) the stage of the proceedings and the amount of discovery completed,
(6) the recommendation of competent counsel, and
(7) the reaction of the class to the settlement.
[Girsh v. Jepson, 521 F2d 153 3rd Cir. 1975).]

The Trial Court failed to consider **any** such criteria prior to approving the MSA, blindly (and erroneously) accepting the AG's judgment[32]. "The courts and not the Attorneys General are the final arbiters of the legality of contracts." Watrel v. Commonwealth, Dept. of Education, 518 A.2d 1158 Pa. 1986). One must "determine whether implementing a settlement is in the best interest of those whose claims will be extinguished." Newberg on Class Actions, section 11.40 (1985).

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[32] Indeed, "An application for intervention **may** [not "must"] be refused if 'the intervention will unduly delay, embarrass or prejudice. . . adjudication of the rights of the parties' " [Pa.R.C.P. 2329(3)].

Instead of analyzing the MSA, however, the courts honored the AG's desire for speedy approval. Through exchanges of briefs during the past year, the AG failed to challenge this portrayal of Dr. Sklaroff's perspective: "Sklaroff argued that the Attorney General does not have the authority to release all future claims by anti-tobacco activists." Yet, the AG has refused to explain why he refused to offer a stipulation foreswearing his admitted inability to halt public-interest litigation[33].

b. ¶ II (pp) must be struck from the MSA.

The CoP Constitution states the AG "shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law." [Article IV] He is not empowered to preclude the filing and prosecution of lawsuits initiated by persons or entities acting in any capacity (e.g., *parens patriae*, sovereign, quasi-sovereign, private attorney general, *qui tam*, taxpayer)[34].

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[33] The haste to approve the MSA in the CoP was patently political, as well. First, the City of Philadelphia filed a brief that raised two concerns that were unsatisfied, but that led to no further legal action. (It stated the defendants had "an obligation to file a petition for interpleader to bring the City of Philadelphia into the case as a party," and it averred "the Court should require the parties hereto to clarify their position on the scope of the release.") Second, the County of Allegheny (Pittsburgh) precipitously dropped its appeal, according to a published account written by its lead-counsel, after Governor Tom Ridge threatened to slash funding for its airport. (The Commonwealth Court permitted this to occur absent submission of a proper application—violations of procedure detailed by Judge Kelley—but the PA Supreme Court denied Dr. Sklaroff's Petition for Review of this particular issue.) Third, journalists have been told that the AG rationalized not suing against the billboards because he feared loss would create adverse precedent [personal communication]; yet, such reticence persists following the filing of litigation that would compel him to do so. [Most everyone became mesmerized by power to spend a "wind-fall," as the TI had anticipated.]

[34] The MSA would have the AG waive rights he was sworn to defend and enforce. He cannot reverse judicial decisions (protecting citizens' rights to sue) or rescind state legislative actions (authorizing *qui tam* filings).

A. spokesperson for the AG told a reporter that this suit is moot because the MSA did not preclude the Coalition's right to sue the TI. "Attorneys general can waive the rights of other parties in certain states, such as New York[34], [Press Secretary Sean] Connolly said, 'But Pennsylvania law does not allow us to do that.' " This sentence could be stipulated.

c. ¶ XII (b) must be struck from the MSA.

The AG's civil litigation powers (". . .to collect by suit or otherwise all debts, taxes and accounts due the Commonwealth. . . .") do not include the right to waive claims of unknown value. 71 Pa.C.S. 732-204 (c). Nevertheless, the Offset indemnifies the TI from **all claims** by taxpayers and "other persons," even if the AG does not have authority to release those claims.

The AG is the CoP's chief consumer law officer, responsible for enforcing the consumer laws and appointing & overseeing a consumer advocate. 71 Pa.C.S. 732-201. He has specific and unique enforcement obligations under the PA Unfair Trade Practices and Consumer Protection Law. 73 Pa.C.S. 201 *et seq.* The Offset, however, places the AG on the wrong side of the battlefield, inasmuch as the AG will now have an $11 billion "incentive" to oppose consumer actions against the TI, lest they result in judgments that will reduce the CoP's annual income through the MSA. The Opinion, quoting the CoP, asserts: "The MSA did not require the AG to intervene on behalf of the TI 'nor would he have any reason to do so.' " Indeed, the AG would be forced to honor the Offset, "which consent shall not be unreasonably withheld," according to the MSA (*vide supra*); ignored is its obvious monetary incentive to support the TI.

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[34] Cursory review of the New York State Constitution (Article V) did not yield language that could be compared/contrasted with that of the CoP; nevertheless, this is a stand-alone quotation that is consistent with what had been stated during oral argument [*vide supra*] and with what Dr. Sklaroff has sought. The AG only avers a stipulation is "unnecessary."

The Offset Provision is complex, unprecedented, overly-broad, inherently vague, unprecedented, unconstitutional, inconsistent with public policy, and *ultra vires*, and it excessively empowers the AG.

The AG is not merely indemnifying the TI for claims filed by people/entities he controls. The AG is immunizing the TI for claims filed by people and taxpayers over whom he has no power. Thus, were awards to other persons to total $11.2 billion, **the CoP would receive no money from the TI through the MSA.** [It's capitated!] Therefore, the offset creates an unholy alliance between the Settling Parties that is contrary to the AG's statutory duties and responsibilities.

Illustrative of how the Offset is already determining the CoP's conduct[36] is an observation of the governor's Secretary of Administration on March 5, 1999, Mr. Tom Paese. He asserted Allegheny County should lobby for its "fair share" rather than pursue RICO litigation to attain it, adding: "A separate settlement for the county simply would be taken from the funds the state already is set to receive."

PM has also tried to deduct a punitive damages award (based solely on an individual's case, overtly excluded from the MSA) to Oregon from the annual allocated payment.

Invoking the Offset Provision is now documented, and it must be clarified—on behalf of the citizenry—through stipulating the MSA. This concern clearly is not speculative. The AG must stipulate what he avers publicly and in briefs.

IV. Granting standing to the petitioner would *inter alia* yield the required judicial review of the lack of an evidentiary justification for the Master Settlement Agreement's denial of future rights of youth—putatively, the class of individuals for whom the litigation had been filed—to seek redress.

---

[36] In addition, the CoP should not have attacked the existence of the Allegheny County RICO filing, for any comment thereupon should have been strictly legal in focus and manifest as an official court filing.

As noted previously, the financial implications of the MSA were not addressed through the judicial process, and estimates as to the current economic risk faced by the TI (perhaps in the hundreds of billions of dollars) in the Engle case (in Florida) illustrate why this issue must be faced.

Commonwealth Court Judge Kelley dissented "with respect to the majority's order discontinuing the above-captioned appeals" [the plural **includes** this case] because:

> The record in this case is absolutely devoid of ***any*** evidence establishing the damages suffered by the Commonwealth through its agencies, departments, com-missions or divisions, ***and*** its 67 counties, ***and*** its various municipalities, cities, boroughs, townships, entities, instru-mentalities and educational institutions. Thus, from this record, there is absolutely no way to determine the adequacy or appropriateness of the proposed settlement in this case. In the absence of ***any*** evidence to support this determination, the trial court was absolutely precluded from possessing the sufficient necessary information to permit an intelligent decision prior to accepting and endorsing settlement in this case.
>
> In conclusion, it is clear to me that a trial court may not place its judicial imprimatur on a proposed settlement and consent decrees, and order the entry of judgment thereon, where the record utterly fails to demonstrate that it is a just and fair resolution to the matter. This is particularly so where the proposed settlement and consent decrees are of such a broad expanse, so absolutely preclude future claims and liability, and may never be altered or amended in any manner by the court. To my mind, the entry of judgment based on such a speculative and conjectural predicate affecting such significant rights must surely constitute an error of law.

CONCLUSION

Dr. Sklaroff has a Legally Enforceable Interest in the unprecedented MSA, *inter alia* due to his capacities to pursue a wide range of public interest litigation, to file a taxpayer lawsuit, and to function in *parens patriae* on behalf of his son. Far from "moot," his pending litigation has been prescient.

He and other activists merit standing, so that they can elucidate clauses in the MSA that require stipulation. The Releasing Parties clause must exclude activists; the Offset clause is procedurally unfair, unreasonable, unconstitutional and inadequate to Pennsylvanians. The AG isn't empowered to immunize the TI, to countenance use of the offset, or to deprive citizens of civil (due process, constitutional) rights.

Abuse of discretion has been documented related both to these specific concerns and to the generic concerns raised by the absence of Trial Court analysis of the intentionally-vague MSA; it is not fair, reasonable or adequate for the CoP's youth. These remedies may be achieved through remand (to study its scientific, legal and ethical implications) or through direct intervention by the Court. The MSA is misconstrued as a "useful first step" in achieving decreased tobacco use in America and around the world; indeed, it threatens to become "the last word" in meaningful smoking cessation, for the TI will have achieved *de facto* indemnification.

The Settling Parties are attempting to "have it both ways" for **they deny the public any power to enforce the MSA, even as the TI violates it and the AG fails to investigate**. These arguments appear in briefs (filed in the year 2000), despite solemn promises they would act responsibly (issued in the year 1999). They misportray the MSA as a contract, when it is a court-approved resolution of a class-action suit.

For these reasons, Robert B. Sklaroff, MD possesses standing to appeal from the Order of Dismissal of his Intervention Petition and, thus, requests remand of the MSA to the Philadelphia Court of Common Pleas in the CoP.

Respectfully submitted,

Robert B. Sklaroff, MD

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Appendix A
Philadelphia Court of Common Pleas Opinion

[The "footnotes" have been transformed to "endnotes"; references to the original pagination have not been retained.]

RECEIVED
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CIVIL ADMINISTRATION

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT OF
PENNSYLVANIA
CIVIL TRIAL DIVISION

Commonwealth of Pennsylvania,
by Michael Fisher,
in his official capacity as Attorney General
of the Commonwealth of Pennsylvania
v.
Philip Morris, Inc. et al.

April Term 1997
No. 2443

Memorandum Opinion

I. Introduction

On January 13, 1999, this court approved Consent Decrees and Final judgments presented by the Commonwealth of Pennsylvania and various Defendant Tobacco Manufacturers to settle and end their landmark lawsuit. This court also denied petitions to intervene by a group of hospitals, Allegheny County, and various private anti-tobacco activists and organiza- tions filed shortly after the settlement agreement was announced in November 1998.

Paradoxically, some of the petitioners stated that they neither opposed the settlement nor sought to participate in it. Rather, they asked this court for an interpretive opinion on whether any future claims against the tobacco defendants could be barred or affected by the release provisions in the settlement agreement (the Master Settlement Agreement or MSA). Alternatively, other petitioners asked this court to delete language from the MSA's release provisions despite protests from the Commonwealth, that such revisions might jeopardize the settlement agreement as to Pennsylvania and result in its exclusion from the monetary and non-monetary benefits of the settlement. [1]

Significantly, except for the group of hospitals, all of the other petitioners requested an interpretive opinion without having filed a claim against the tobacco defendants. Moreover, the activists and Allegheny County asserted broad, anticipatory policy arguments against the indemnification scheme within the MSA. They argued, for instance, that it would force the state to come to the defense of the tobacco industry, thereby pitting it against future claims by the activists and Allegheny County. These broad public policy arguments—as distinguished from constitutional arguments or arguments premised on case law or statutes arising in an actual case or controversy—did not present justiciable standards for court review on the record presented by the petitioners.

These petitions thus were not based on an actual case or controversy but sought instead an advisory opinion despite a longstanding tenet of jurisprudence against providing them. See generally Gabel v. Cambruzzi, 532 Pa. 584, 616 A.2d 1364, 1369 (1992) (where court lacks sufficient facts to issue anything but an advisory opinion it "will not break its tradition of refusing to author advisory opinions"); Milton Hershey Medical Center v. Doe, M.D., 407 Pa. Super. 565, 595 A.2d 1290, 1293 (1991), aff'd, 535 Pa. 9, 634 A.2d 159 (1993), quoting Okkerse v. Howe, 521 Pa. 509, 556 A.2d 827, 833 (1989) (an advisory opinion is without legal

effect); Suehr v. State Ethics Commission, 1994 Pa. Cmmw. LEXIS 670, 651 A.2d 648, 649 (Pa. Cmwlth. 1994), alloc denied, 541 Pa. 647, 663 A.2d 697 (1995) (where no case or controversy exists, a court should not render an advisory opinion).

The only petitioners who had an actual claim pending—the group of hospitals—had filed their complaint in Allegheny County shortly after the settlement was announced. Any ruling on the impact of the MSA on this claim is both premature and more appropriately decided by the presiding judge in that litigation if, and when, the MSA release provisions are raised.

The precise legal issues raised by these petitions must be carefully defined. The petitions of the activists and Allegheny County, for instance, raise the following issue: Did the petitioners establish a "legally enforceable interest" to intervene in the final, settlement stages of the Commonwealth's highly innovative—but risky—lawsuit based on their concern that the MSA might affect their future (but yet unfiled) actions against the tobacco defendants. The petitioners ultimately failed to establish such an interest because their claims do not present a case or controversy ripe for disposition. The record created during the intervention hearing and in the memoranda as to the inherent limitations within the releases might, however, ultimately prove useful—although a determination of the actual scope of these releases must await an actual case or controversy. There was, moreover, no dispute that the releases would not affect the rights of individuals who suffer tobacco related injuries from bringing legal actions against the tobacco defendants to recover for those injuries. [2] Furthermore, the Commonwealth and tobacco defendants indicated that the release would not bar such other claims as requests for injunctive relief. [3]

Several of the petitioners have filed appeals of the orders denying their intervention. The following opinion is therefore entered to address the many concerns and issues

raised by the petitioners and to explain the denial of the intervention petitions.

II. Procedural Background

After months of negotiations, [4] forty-six states, the District of Columbia and five territories on November 23, 1998 executed [5] two agreements to settle their nationwide lawsuits against tobacco manufacturers—the Master Settlement Agreement (MSA) and the Smokeless Tobacco Master Settlement Agreement (STMSA). [6] In signing these agreements, the Commonwealth of Pennsylvania, through its Attorney General D. Michael Fisher, resolved to end the lawsuit it had filed in April 1997 against various tobacco manufacturers, their public relations agency and the three trade associations created by them (hereinafter "tobacco defendants"). [7]

The MSA required each settling state to file a consent decree with its appropriate state court. [8] Consequently, on December 11, 1998, the Commonwealth and tobacco defendants [9] filed Joint Motions to approve the settlement and consent decrees. Before and after this joint motion was filed, petitions to intervene were filed by individuals and organizations (hereinafter "Petitioners") representing a cross-section of interests: private anti-tobacco activists and organizations; not-for-profit hospitals that had filed a complaint against tobacco manufacturers seeking recovery *inter alia*, of unreimbursed healthcare costs of Medicaid recipients [10], and Allegheny County. In addition, the City of Philadelphia filed an amicus brief to assist the court in evaluating the MSA. [11] A common bond among these petitioners was an assertion that they did not oppose the MSA in general [12]; they were, however, deeply concerned that release and offset provisions within the MSA might stifle or destroy their right to bring effective legal actions against the tobacco defendants in the future—even though

the petitioners were not signatories to the settlement agreement.

The issues raised by the petitioners—whether they should be granted leave to intervene because release provisions in the MSA might affect any future action against the tobacco defendants—were serious. During the intervention hearings that were held on two separate days, this court sought to raise and address the concerns raised by the petitioners. Ultimately, upon consideration of the testimony at the hearings, the documents submitted by all parties and petitioners, and the relevant precedent, this court concluded that the petitions to intervene should be denied for the reasons set forth below as to each petitioner.

III. The Settlement Agreement [13]

The Master Settlement Agreement negotiated by the Commonwealth and tobacco defendants is massive and complex, numbering 147 pages with 21 exhibits. In presenting this agreement, the Commonwealth and tobacco defendants emphasize that it will provide the following relief resulting in "far-ranging changes in the tobacco industry's business practices, advertising and marketing:

- Prohibits the direct or indirect targeting of minors in the advertising, promotion, or marketing of tobacco products.
- Bans use of cartoons in advertising, marketing, and packaging.
- Restricts brand name sponsorships.
- Removes and bans all tobacco billboards.
- Removes and bans all transit tobacco advertising.
- Bans payment for product placement in movies as well as in television shows, theatrical performances, live theater, recorded performances, and video games.

- Restricts distribution of free samples to adult-only facilities.
- Requires proof of age for distribution of free gifts.
- Restricts the use of brand names by third parties and requires tobacco companies to enforce their trademarks.
- Bans the use of nationally recognized brand names as names of future tobacco products.
- Establishes a minimum pack size of 20 cigarettes until December 31, 2001 . . . .
- Dissolves the Tobacco Institute, The Council for Tobacco Research, and the Council for Indoor Air Research, and mandates that future trade associations do not act like those of the past.
- Restricts lobbying against laws that limit non-tobacco products that look like tobacco products (e.g. bubble gum).
- Establishes a user friendly searchable web site of all industry produced documents.
- Establishes a counter-advertising fund and education foundation of at least $1.45 billion, which includes $250 million to fund the study of youth smoking.
- Establishes a $50 million enforcement fund with the National Association of Attorneys General.

Conmonwealth's Settlement Memorandum at 3-4.

These concessions by the tobacco defendants, the parties assert, are a major accomplishment because they exceed the kind of injunctive relief that this Court would have been able to extend in light of First Amendment and other constraints. Id. at 4. Indeed, the difficulties in limiting tobacco advertising even when aimed at minors was demonstrated recently by a Federal District Court Judge's decision to strike

down a New York City Ordinance entitled the "Youth Protection Against Tobacco Advertising and Promotion Act." This law limited, *inter alia*, outdoor advertising for tobacco products in the vicinity of schools, playgrounds and other places children gather. The court struck down this local law on federal preemption grounds without even reaching the thorny First Amendment issues. Greater New York Metropolitan Food Council, Inc. v. Giuliani, 1998 U.S.Dist. LEXIS 19498 (Dec. 15, 1998). In contrast, the significant benefits secured by the MSA agreement were underscored by one commentator who observed that "since most outdoor cigarette advertising is to end under the nationwide settlement with tobacco companies that part of the law would have been largely irrelevant." [14]

In addition to these voluntary restraints on the tobacco industry's marketing initiatives, the MSA will bestow on the settling states an unprecedented financial recovery. Under these agreements, the tobacco industry is required to pay to the states "$206 billion dollars over 25 years." In the course of these 25 years, Pennsylvania will receive $11.26 billion with the potential of payments of "over $500 million per year thereafter." Indeed, Pennsylvania's share of the total recovery represents "the third highest recovery among the settling states." [15] These massive sums of money hold the promise of inestimable benefits for the citizens of Pennsylvania. Not surprisingly, when this settlement agreement was initially offered to the 46 states as an option to continuing their lawsuits against the tobacco manufacturers, all 46 states decided to sign the agreement. [16]

The parties emphasize that they are not required by the Rules of Civil Procedure to seek court approval and the entry of a consent decree in this case. [17] However, the MSA requires certain uniform procedures in each settling state that will be facilitated by the entry of consent decrees creating "continuing jurisdiction in this Court to adjudicate any interpretation issues and issues of enforcement that may arise as they apply to Pennsylvania." [18] As of December 10,

1998—the day before the parties filed their motion for the court's approval of the consent decree—courts in twenty other states had approved the settlement and entered the Consent Decrees. [19] Before this court could consider approving the MSA, however, it was necessary to address the issues raised by the intervention petitions.

IV. Petition to Intervene of the Not-for-Profit Hospitals

A group of sixteen Pennsylvania not-for profit hospitals filed a petition to intervene for declaratory relief "to determine whether the MSA affects the claims set forth" in a complaint that they had filed against various tobacco defendants on December 10, 1998 in Allegheny County." [20] In filing their Allegheny County complaint, the hospitals seek to recover the "unreimbursed cost of health care services" that they provided to the "State's Medicaid and medically indigent patients" as a result of tobacco-related injuries. [21]

The hospitals claim that they may intervene in the remaining phases (i.e. settlement) of the Conmonwealth's action against the tobacco defendants because the hospitals have a "legally enforceable interest" as set forth in Pa. R. C. P. 2327 (4) that may be affected by the Release Provisions in the MSA:

> Proposed intervenors have legally enforceable interests at stake insofar as the MSA and Consent Decree may affect their ability to assert, and obtain Recovery for, claims they have and/or may have against the settling defendants. Proposed intervenors have a further interest in any damages awarded pursuant to the MSA and Consent decree that relate to tobacco attributable healthcare costs for Medicaid recipients and the medically indigent. Hospitals' Memorandum at 3 (emphasis added).

More specifically, the hospitals sought from this court a declaration of their rights under the MSA:

> Specifically, they ask this court to determine whether the MSA and/or Consent Decree release or bar Proposed Intervenors' claims against the Tobacco Defendants in their separately filed action in Allegheny County. Second, if this Court determines that the Proposed Consent decree does in fact release their claims, then the Proposed Intervenors ask this Court to determine what rights the Proposed Intervenors have under the MSA and the Consent Decree, including what rights they have to the proceeds of the settlement terminating their claims. [22]

A. The MSA Release Provisions At Issue [23]

The hospitals argue that the claims set forth in their Allegheny County Complaint against the tobacco defendants might become ensnared in the broad definitions for "Claims" and "Released Claims" set forth in the MSA. The term "Claims," for instance, includes all "claims" whether " 'legal, equitable, or statutory.' " [24] The definition of " 'Released Claims' includes the claims set forth in Exhibit D to the MSA, or any comparable Claims that . . .could be. . . asserted . . .in any comparable action . . .by a 'Releasing Party.' " [25] Because of this broad language, the hospitals argue, the hospitals' claims against the Tobacco Defendants may fall within the definition of "Released Claims." Hospitals' Memorandum at 9.

The Hospitals are also concerned that the following broad definition of "Releasing Parties" in the MSA might include them:

> [T]o the full extent of the powers of the signatories hereto to release past, present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise

> including but not limited to, municipalities, counties. . .and hospital districts). . .and (2) persons or entities acting in a *parens patriae*. . .or in any other capacity, whether or not any of them participate in this settlement. . . .(B) to the extent that any such entity (as opposed to an individual) is seeking recovery of health care expenses. . .paid or reimbursed, directly or indirectly, by a Settling State. Hospitals' Memorandum at 10 (quoting MSA, ¶II (pp)) (emphasis in original).

Finally, the hospitals urge this court to consider the broad implications of Section 7 of the Consent Decree and Section XII of the MSA, the Settling States' Release, Discharge and Covenant because "[m] ost, if not all, of the provisions of this section could be interpreted to affect rights of the Proposed Intervenors." Hospitals' Memorandum at 10 (emphasis added). The hospitals suggest that their rights might be affected by the following language in XII (a) because of the broad definition of "Releasing Party" in the MSA:

> (1) Upon the occurrence of State Specific Finality in a Settling State, such Settling State shall absolutely and unconditionally release and forever discharge all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall, or may have . . ..
>
> (3) Each Settling State (for itself and for the Releasing Parties) further covenants and agrees that it (and the Releasing Parties) shall not . . .sue or seek to establish civil liability against any Released Party . . .and further agree that such covenant and agreement shall be a complete defense to any such civil action or proceeding.

MSA, ¶XII (a), (as quoted by Hospitals' Memorandum at 10-11).

Finally, the hospitals are concerned that the following provisions in ¶XII (B) "could" operate to bar their claims:

> (b) Releasing Claims Against Released Parties.
> If a Releasing Party (or any person or entity enumerated in subsection II (pp), without regard to the power of the Attorney General to release claims of such person or entity) . . .nonetheless attempts to maintain a Released Claim against a Released Party. . . .The Released Party may offer the release and covenant as a complete defense. [26]

B. Applicable Standards for Intervention

The criteria for intervening in a pending action are set forth in the Pennsylvania Rules of Civil Procedure 2326 through 2329. Pa.R.C.P. 2327, for instance, provides in relevant part that intervention should be permitted if:

> (3) such person could have joined as an original party in the action or could have been joined therein; or
> (4) The determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action. Pa.R.C.P. 2327

The rules further provide that a hearing be held to consider a petition to intervene. Pa.R.C.P. 2329. The court may then either allow intervention or refuse it if the following conditions exist:

> (1) The claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
> (2) the interest of the petitioner is not already adequately represented; or
> (3) The petitioner has unduly delayed in making application for intervention or the intervention

will unduly delay, embarrass or prejudice the trial or adjudication of the rights of the parties. Pa.R.C.P. 2329

In the instant case, the hospitals seek to intervene based on both Pa.R.C.P. 2327(4), which allows intervention if they can show a "legally enforceable interest" in that action, and on Pa.R.C.P. 2327(3).

C. The Hospitals Fail to Establish the Requisite "Legally Enforceable Interest"

The standard for determining a "legally enforceable interest" for intervening in a pending action under 2327(4) is not as straightforward as it might at first appear. As the Pennsylvania Supreme Court has long emphasized, "the exact boundaries of the 'legally enforceable interest' limitation [of Pa.R.C.P. 2327(4)] are not clear." Consequently, "[t]he result is a flexible, although uncertain rule whose application in a given case calls for a careful exercise of discretion and consideration of all the circumstances involved." Pennsylvania Crime Commission Subpoena, 453 Pa. 513, 309 A.2d 401, 406 (1973); Pennsylvania R.R. Co. v. Hughart, 422 Pa. 615, 222 A.2d 736, 738 (1966) (citations omitted). In applying this rule, it is thus necessary to analyze the exact nature of the "legally enforceable interest" that the hospitals claim "may be" affected by the MSA within the context of the Commonwealth's action against the tobacco defendants.

In arguing that the potential effect of the Release Provisions in the MSA constitutes a legally enforceable interest under Pa.R.C.P 2327(4), the hospitals cite cases outlining the standards for intervening under this rule. Hospitals' Memorandum at 7-8. The facts of these cases, however, are clearly distinguishable from the hospitals' essentially hypothetical concerns about the potential impact of the MSA on their Allegheny County action. This case by case analysis is necessary in light of the fact sensitive

standard for determining whether a petitioner has presented a "legally enforceable interest" sufficient to allow intervention.

In four of the five cases cited by the hospitals, the intervenors' interest in the underlying action was patent. Thus, in Bannard v. N. Y. State Natural Gas Corp., 404 Pa. 269, 172 A.2d 306, 310, 312 (1961), the Pennsylvania Supreme Court concluded that the owner of a parcel of land (i.e., the Pennsylvania Game Commission) could intervene in an action of ejectment that was filed against its tenant. The court observed, however, that this right to intervene was premised on the Act of 1915 rather than Rule 2327. Id., 172 A.2d at 312. Similarly, in Tremont Township School District v. Western Anthracite Coal Co., 381 Pa. 276, 113 A.2d 234 (1955), the Pennsylvania Supreme Court concluded that the county had a legally enforceable interest and could intervene in an action to attach royalties collected from coal mined from the County's property. The Supreme Court in Bily, Exec. v. Allegheny Cty. Bd. of Property Assessment, 353 Pa. 49, 44 A.2d 250 (1945) concluded that a mortgagee who foreclosed on her property and purchased it at a sheriff's sale should have been allowed to intervene as the new owner of the property during tax appeal proceedings relating to her property. Finally, in Commonwealth, Dept. of Gen. Servs. v. Weinberger, 65 Pa. Cmwlth. 201, 441 A.2d 1341 (1982), a subcontractor was permitted to intervene in an action brought by his contractor to recover for payments due where the subcontractor's payments were withheld by the contractor pending resolution of the litigation.

In a fifth intervention case cited by the hospitals, the court held that intervention should not be allowed. See, e.g., Marion Power Shovel Co. v. Fort Pitt Steel Casting, Co., 285 Pa. Super. 45, 426 A.2d 696 (1981). In Marion Power, a striking union and its members sought to intervene in a replevin action brought against their employer/manufacturer by a customer/company that wanted to seize possession of steel castings manufactured by the union members' employer. The union asserted a legally enforceable interest

in the steel castings because of "incentive wages" that might have been due to them on the castings. The Marion Power court, however, rejected this argument, noting that the union "neither claims nor could claim the right" to possess the castings, which it needed solely as a basis to calculate incentive wages. Id., 426 A.2d at 702.

In all of these cases where the courts allowed intervention, the proposed intervenors' interests in the underlying action were clear and direct as either property owners or subcontractors whose interests were clearly at issue in the underlying action. None of these cases, therefore, bears a close factual similarity to the hospitals' request for an interpretation of the potential effect of the MSA release provisions. It must be noted, of course, that these cases are also distinguishable because the hospitals are requesting a declaratory judgment. Nonetheless, precedent construing the Declaratory Judgments Act likewise establishes that the hospitals could not intervene in the Commonwealth's case because their claims are too remote and fail to present an actual case or controversy ripe for adjudication.

D. The Hospitals' Request for Declaratory Relief Fails to Present an Actual Case or Controversy Ripe for Disposition

In their petition to intervene, the hospitals seek a declaratory judgment and properly attached a copy of their proposed pleading as required by Pa.R.C.P. 2328. In this Complaint in Action for Declaratory Judgment, the hospitals invoke the Declaratory Judgments Act and assert that this court has jurisdiction under 42 Pa.C.S. 5753. [27] Section 7532 provides:

> Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not

further relief is or could be claimed. 42 Pa.C.S.A. ¶ 7532.

Despite this broad language, courts interpreting the Declaratory Judgments Act have emphasized the need for a case or controversy before a court may act pursuant to this Act. Thus, "[a]lthough the Declaratory Judgments Act is to be liberally construed," the Commonwealth Court recently observed, "some limitation on a court's ability to issue a declaratory judgment is that the issues involved must be ripe for judicial determination, meaning that there must be the presence of an actual case or controversy." Pa-State Lodge, Fraternal Order of Police v. Com., Dept. of Labor & Indus., 692 A.2d 609, 613, 1997 Pa. Commw. LEXIS 150 (1997), aff'd, 550 Pa. 549, 707 A.2d 1129 (1998). The Pennsylvania Supreme Court likewise emphasized:

> Only where there is a real controversy may a party obtain a declaratory judgment. A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic. Gulnac v. South Butler County School Dist., 6 Pa. 483, 587 A.2d 699, 701 (1991) (citations omitted).

Thus, in Fraternal Order of Police v. Dept. of Labor, supra, the Commonwealth Court dismissed the FOP's petition for a declaratory judgment that amendments to the Pennsylvania Workers Compensation Act were unconstitutional because its new offset provisions would have an "adverse actuarial impact" on their pension plans. In so doing, the court explained that the FOP did not allege any facts that demonstrate "any actual and immediate harm" from these amendments. Thus, the FOP "has presented no case or controversy between the parties for which we are empowered to declare rights." Id., 692 A.2d at 613-614 & 611. See Also Pa. State Lodge, FOP by Bascelli v. Com..

131 Pa. Cmwlth. 611, 571 A.2d 531, 532 (1990), aff'd, 527 Pa. 363, 591 A.2d 1054 (1991) (the FOP's petition for declaratory judgment that certain pension laws violated the Pennsylvania Constitution's authorization of collective bargaining was dismissed where the FOP failed to allege that any contract with the Commonwealth had not been enforced because of the challenged statutes); Pa. Gamefowl Breeders Assoc. v. Com., 533 A-2d 838, 840-41, 1987 Pa. Commw. LEXIS 2646 (1987) (petition for declaratory relief denied because Gamefowl Breeders failed to state a case or controversy ripe for review and "a declaratory judgment will not be entered in anticipation of events that have not occurred or may never occur").

A series of three cases, presenting facts and issues analogous to those raised by the hospitals, petition, and are also instructive. See Brown, Adm. of the Est. of Zimmerman v. Com., Liquor Control Bd., 673 A.2d 21, 1996 Pa. Conmw. LEXIS 91, app. denied, 546 Pa. 648,683 A.2d 886 (1996); Avrich v. General Accident Ins. Co., 367 Pa. Super. 248, 532 A.2d 882 (1987); Boyle v. Com., Dept. of Trans., 151 Pa.Cmwlth. 430, 617 A.2d 70 (1992). In Brown, Adm. Of the Est. of Zimmerman v. Com, Liquor Control Bd., 673 A.2d 21, 1996 Pa. Cmwlth. LEXIS 91 (1996), an Administratrix of Zimmerman's estate brought a wrongful death action after he was killed in an automobile accident with intoxicated students. The Administratrix named various defendants including the students, the Pennsylvania Liquor Control Board (PLCB), and the Pennsylvania Department of Transportation ("DOT").

While this action was pending, the Zimmerman Administratrix also brought a declaratory judgment action seeking a determination as to the maximum amount the Estate might recover in its action. Under 42 Pa.C.S. ¶¶ 8522 & 8528, the maximum amount a plaintiff could recover as to Commonwealth parties was $250,000. The Administratrix apparently wanted to bypass this limitation with a declaratory judgment that the PLCB and DOT were each

liable for a maximum of $250,000. The Commonwealth Court concluded, however, sua sponte that it could not consider this issue because there was no case or controversy until a judgment in excess of $250,000 was entered against both the PLCB and DOT. "While both this court and the trial court have the power to determine the statutory limits of liability on commonwealth parties," the Zimmerman court observed, "we do not have the ability to grant any relief that is merely advisory, one that does not involve any case or controversy. Any action, including a declaratory judgment action, may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove purely academic." [28]

Such an opinion, the court emphasized, would have been academic because the plaintiff had not yet achieved any judgment against the defendants. Her case was not ripe because of a variety of contingencies: "it was possible that both Commonwealth parties may be found liable, only one of the Commonwealth parties will be found liable, or neither" would be found liable. [29]

Similar unknown contingencies bedevil the petitioning hospitals—and indeed all litigants. What they are seeking is determination of an issue that is not actual: whether a contractual defense might be raised against them in a different proceeding. As counsel for the tobacco defendants suggested during the hearing, it could be some time before this defense is asserted—if ever—in an Answer to the hospitals' Complaint. Prior to that, the tobacco defendants "no doubt" [30] will file preliminary objections—with their inherently uncertain impact on the hospitals' claims. Yet another possible contingency is that a court—at the appropriate stage in the proceeding—might conclude that the Releases in the MSA have no impact whatsoever in the Hospitals' Allegheny County claim. For this reason, the hospitals, petition is not ripe; this court cannot interpret the

MSA in a vacuum without presenting an advisory opinion without legal effect. See, e.g., Gulnac v. South Butler County School Dist., 526 Pa. 483, 587 A.2d 699, 701 (1991) (the court erred in unnecessarily deciding a constitutional issue in a vacuum, thereby rendering "an advisory opinion which our courts are not entitled to do"). But cf. Reichley. v. North Penn School District, 533 Pa. 519, 626 A.2d 123 (1993) (distinguishing the facto of Gulnac). See generally Gabel v. Cambruzzi, 532 Pa. 584, 616 A.2d 1364, 1369 (1992) (where court lacks sufficient facts to issue anything but an advisory opinion it "will not break its tradition of refusing to author advisory opinions"); Milton Hershey Medical Center v. Doe, M.D., 407 Pa. Super. 565, 595 A.2d 1290, 1293 (1991), aff'd, 535 Pa. 9, 634 A.2d 159 (1993), quoting Okkerse v. Howe, 521 Pa. 509, 556 A.2d 827,833 (1989) (an advisory opinion is without legal effect).

E. The Practical Effect of the Hospitals' Premature Constitutional and Substantive Arguments is to Undercut their Claimed "Legally Enforceable Interest" to Intervene

There is yet another reason why the Hospitals' Petition to Intervene was denied. The thrust of the hospitals' argument for intervention is that the sweeping language of the MSA release provisions "could be interpreted to affect the rights of the Proposed Intervenors." Hospitals' Memorandum at 10. After outlining the provisions of the MSA that might affect them, the hospitals then present formidable arguments as to why these provisions do not encompass their Allegheny County claims.

They assert, for instance, that their constitutionally protected right of access to the courts and their right to be free from governmental taking of property without due process or just compensation would be violated by such a sweeping interpretation of the MSA. Hospitals'

Memorandum of Law at 13-15. They further argue that the Attorney General lacks the authority to release the Hospitals' claims under the "Commonwealth Attorneys' Act", 71 P.S. ¶732-201 et seq. [31] Finally, the hospitals assert the general rule that settling parties and court approved settlement agreements may not dispose of third parties' claims without their consent. [32] The practical effect of such arguments, ironically, is to undercut their initial assertion that they must be allowed to intervene based on the negative impact of the MSA release provisions on the hospitals' claims.

Both the Commonwealth and the Tobacco defendants are careful not to address these substantive arguments in their memoranda. Rather, they suggest that such arguments are premature. During the intervention hearing, however, the settling parties were more forthcoming as to the scope of the releases and consent decree. In response, for instance, to questioning as to the effect of the releases on the hospitals' claims, Counsel for the Commonwealth stated that he did "not believe it was the intention of the attorney Generals of 50 states to release those claims." N.T. (1/8/99) at 26. When asked to elaborate as to whether Attorney General Fisher released the hospitals, claims, he responded: "The agreement expressly says we did not release claims of private organizations for claims that we did not assert. Unreimbursed costs are not claims that we asserted." N.T. (1/8/99) at 28. He further stated:

> I would say the general concept was the Attorney General's—we're agreeing to release quasi-sovereign public claims for reimbursed costs for tobacco related illness period.
>
> But they were also expecting through certain claims that might get filed that might be directly or indirectly reimbursed claims for tobacco-related illness would also be released.
>
> So you get into the directly or indirectly language, you get into the need to go behind the

> pleading, and I am assuming that if I had checked out all the charters of these hospitals they would be about totally private organizations.
>
> We were not intending, at the time the discussions took place, to release private claims of private hospitals that were not, in effect, claims for reimbursement but were unreimbursed costs. N.T. (1/8/99) at 28-29.

This statement was offered, however, with the cautionary note that these issues would have to be raised—and resolved—after the defense was actually asserted in the context of a particular case. Id. This point is ultimately convincing since otherwise this court would be forced to make an anticipatory ruling without the requisite facts.

The hospitals were also concerned that court approval of section VII of the Consent Decree might be interpreted as finding that "the Attorney General has full and complete authority to bind everyone set forth in the MSA." [33] At the hearing, this court therefore asked counsel for tobacco defendant Philip Morris: "would you agree that if the attorney general, at (sic) any given state, did not have the authority to release particular claims that are specifically mentioned within the MSA, that the court does not approve a release of those claims." She responded affirmatively. [34]

F. The Hospitals Have Not Established Intervention under Pa.R.C.P. 2327(3)

As an alternative basis for intervention, the hospitals argue in their motion and memorandum that they can intervene under Pa.R.C.P. 2327(3) which allows intervention if "such person could have joined as an original party in the action or could have been joined therein." The rule for permissive joinder provides:

> Persons may join as plaintiffs who assert any right to relief jointly, severally, separately, or in the alternative, in respect of or arising out of the

> same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the rights to relief of all such persons will arise in the action. Pa.R.C.P. 2229

The Commonwealth, in contrast, denies that the hospitals could have joined as original parties in their action because of profound differences in their complaints and causes of action. [35] The Commonwealth filed its complaint in April 1997 in its capacity as sovereign and as *Parens Patriae* on behalf of all of its citizens [36] alleging, *inter alia*, that the defendants disregarded and violated the laws and public policy of Pennsylvania to market their cigarettes and other tobacco products to Pennsylvania's children. Moreover, it alleged that the tobacco defendants purposefully manipulated the nicotine levels in their products to addict the citizens of Pennsylvania. [37] In filing this action, the Commonwealth sought to recover for the state's expenditures for medical assistance provided through Pennsylvania's Medicaid and General Assistance Program for treatment of tobacco related injuries. [38] It also sought punitive damages, civil penalties, and injunctive and other equitable relief.

The hospitals, in contrast, brought their action as "not-for-profit-corporations" to recover their "unreimbursed costs for healthcare provided in the past, healthcare currently being provided and future healthcare to be provided to Medicaid, medically indigent patients" suffering from tobacco related injuries. [39]

During the intervention hearing, the hospitals conceded that they had not joined in the Conmonwealth's action earlier because initially their claims seemed significantly different—until the hospitals learned of the broad release provisions in the MSA:

> THE COURT: The Commonwealth in the settlement proposes to recover sums representing the payment of medical expenses. The hospitals propose to recover what they didn't receive by

way of providing care to Medicaid indigents and non-paying patients for tobacco related health treatment. The damages don't seem the same.
Mr. O'Rourke: They're not exactly the same.
THE COURT: How is there any similarity at all? I don't see any similarity.
Mr. O'Roarke: That's why we didn't intervene in the Attorney General's action. But when it does come to release provisions whether or not the damages are identical in the Commonwealth's brief on pages 4 and 5 they talk about the differences in our damages. N.T. (1/8/99) at 7-8 (emphasis added).

Later in the hearing, the hospitals' counsel explained that they did not attempt to intervene earlier in the Conmonwealth's action because of the distinctions between that action and the hospitals' claims against the tobacco defendants:

> To answer the other parts of the questions as to why we delayed, that's precisely why we delayed. We had no reasonable idea that our damages were implicated in this lawsuit and we entered only when this language popped up in the master settlement agreement. N.T. (1/8/99) at 14.

The hospitals also make this point in their memorandum: that it is the MSA and the Consent decree that "create the common questions of law and fact" that would allow them to intervene in the Commonwealth's action. Hospitals' Memorandum at 20. Yet, for the reasons previously stated, the relief requested by the hospitals—an interpretation of the release provisions of the MSA in a vacuum before it has been raised against them—is not yet ripe. To address their concerns at this point would result merely in an advisory opinion without legal effect. See Gulnac v. South Butler County School Dist., 526 Pa. 483, 587 A.2d 699, 701 (1990) (trial court erred in issuing an advisory opinion "which our courts are not entitled to do"). But cf. Reichley v. North

Penn School District, 533 Pa. 519, 626 A.2d 123 (1993) (distinguishing the facts of Gulnac).

G. Comity Concerns

Finally, another problem with the hospitals' request to intervene must be noted. The hospitals elected to file their lawsuit against the tobacco defendants in the Allegheny County Court of Common Pleas. They fail to explain why this court in Philadelphia County should intrude and decide the scope of the MSA release in advance of the filing of any answer that asserts a defense based on the MSA. Such an intrusion invites chaos, forum shopping and ignores all procedural precedent much less the comity among our state courts and the associated deliberative process observed by both forums with respect to matters pending.

V. Petitions to Intervene by Private Anti-Tobacco Activists and Allegheny County

The County of Allegheny [40] as well as various public activist organizations and individuals [41] filed petitions to intervene in this case both individually and on behalf of a similarly situated class (hereinafter "Private anti-tobacco activists" or "activists"). [42]

In contrast to the hospitals, the activists and Allegheny County do not have any pending action against the tobacco defendants. They argue, however, that they should be permitted to intervene because the broad definition of "releasing parties" in the MSA, II (pp) and the release/indemnification provisions in MSA, XII, [43] could affect any future claims against the tobacco defendants. They thus assert that approval of the MSA "may affect legally enforceable interests' of the petitioners. [44] Unfortunately, neither the county nor the activists cited a single case in their petitions or memoranda to assist the court in determining whether they have, in fact, asserted a legally enforceable

interest. The Pennsylvania Supreme Court has emphasized, however, that because the "exact boundaries of the 'legally enforceable interest' limitation [of Pa.R.C.P. 2327(4)] are not clear," its application in a particular case "calls for the careful exercise of discretion and a consideration of all the circumstances involved." Pennsylvania Crime Commission, supra, 309 A.2d at 406. It is thus necessary to analyze the petitioners' asserted interests within the context of the applicable rule and precedent.

The definition of "releasing parties" that the activists and Allegheny County object to provides: [45]

> "Releasing Parties" means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories to release past, present, and future claims, the following: (1) any Settling State's subdivisions (political and otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in a *parens patriae*, sovereign, quasi-sovereign, private attorney general, *qui tam*, taxpayer or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity (as opposed to an individual) is seeking recovery of health-care expenses (other than

> premium or capitation payments for the benefit of present or retired state employees) paid or reimbursed, directly or indirectly, by a Settling State. MSA, II (pp).

Even a cursory analysis of this definition suggests its complexity, with distinct qualifiers and limitations. Allegheny County argues that because the definition of "releasing parties" includes "counties" its interests have been compromised by the Attorney General without its consent. [46] The Anti-Tobacco Activists likewise claim this definition could include them as individuals and organizations "if they attempt to bring public interest litigation against the tobacco companies" even though they were "completely excluded from" the settlement negotiations and will receive no benefit from it whatsoever. [47]

More specifically, Allegheny County argues that the definition of "releasing parties" harms the County and creates a legally enforceable interest sufficient to intervene because "the harm is sustained at the point we go to court and the MSA is presented as a defense. It's the harm that we have to overcome this defense, and without this language, we would just go to court and prove our case." N.T. (1/12/99) at 14-15.

The Commonwealth counters that the scope of the release is clearly limited to "the Power of the Signatories [the Attorney General of Pennsylvania] hereto to release past, present, and future claims." [48] At the hearing, the Commonwealth's counsel also emphasized that the MSA was, in essence, an agreement forged on a national scale involving 46 states and a number of territories. Counties and cities in some of these states had either filed their own claims or joined in the particular State's claims: [49]

> So the people who were trying to draft this agreement had to deal with political subdivisions. And, therefore, what they came up with is the language that, yes, there is a release for political

subdivisions, but it is "To the full extent of the power of the signatories hereto to release all present and future claims."

They did not intend, by one sentence, to have the sweeping enforceable test. They left it to a state-by-state determination of whether the attorney general does, indeed, have that power.

We have looked at the current law of Pennsylvania, Your Honor, and I stress the word current because as Your Honor is well aware, in some states, the plaintiffs got somewhat of a boost in the merits of their claims by significant substantive amendments to support their claims against the tobacco industry, and I have no idea what the future Commonwealth statutes could be, which might affect this. But based upon our review of the current Pennsylvania law, we are not aware of any authority under the current law that gives the attorney general the authority to release the claims of political subdivisions or—by that. I'm including municipalities or counties. That is one lawyer's opinion and it's not an opinion that's based on a really thorough saturation of work. It's just a preliminary review. [50]

Moreover, at the conclusion of the hearing the Attorney General stated: "So with that, I thank the Court for giving me the opportunity to say those remarks and I would say to the intervenors, I appreciate the good faith in which they all come here before this court. We believe we have done nothing to interfere with their interest in settlement of our case, and to the extent that we can continue to work with them, we are interested in their input and their public comments. [51]

These assurances as to the scope of the release, while potentially helpful in a future case the County may seek to file against the tobacco defendants, underscore the

hypothetical, abstract nature of the interest the County is asserting.

Like Allegheny County, the activists are concerned about any limitations that might affect any future—but as yet unfiled—claims against the tobacco defendants. As they argued in their petition to intervene, "[I]f the MSA is approved, its effect on petitioners and the class they represent will be to render them vulnerable to dismissal in any future action they might bring against the tobacco defendants in furtherance of their common goals in tobacco control . . . ." [52] The activists argue that "the release provisions of the MSA effect an unconstitutional deprivation of Petitioners' right of access to the courts . . ." [53] but they cite to no concrete harm other than the potential (but as yet undetermined) effect of the release. The Commonwealth counters, however, that the definition of "releasing parties" is inherently limited. First, the definition applies to persons or entities acting in certain specified capacities that seek relief "generally applicable to the general public" as opposed to private or individual relief. [54] Second, the definition applies to entities "seeking recovery of health care expenses (other than premium or capitation payments for the benefit of present or retired state employees) paid or reimbursed directly or indirectly, by a Settling State." [55] Finally, the scope of the release for "releasing parties" is specifically limited "to the full extent of the power of the signatories hereto [i.e., the Attorney General]." [56]

These provisions, the Commonwealth argues, clearly would not apply to class actions involving Pennsylvania's smokers since that would not be a lawsuit applicable to the general public. They would also not apply to Pennsylvanians who sustained damage due to direct or indirect exposure to tobacco products. [57] "Therefore," the Commonwealth suggests, "it is hardly surprising that the petitioners failed to articulate any even theoretical future lawsuit that they could bring that would be

released under this provision and that would not have been within the Attorney General's power to release." [58]

During the hearing, the activists argued that "it is not a good idea to cut out all public interest litigation for the next 25 years" [59] and in so doing addressed the Commonwealth's arguments that their claims were hypothetical. "In response to the claim that our position is hypothetical," [60] the activists asked the court to consider their appendices, and especially the affidavit of Jeffrey Barg concerning the efforts of the organization, TEACH (Tobacco Free Education and Action Coalition for Health), to control the sale of tobacco to minors by Rite Aid in violation of a City ordinance. N.T. (1/8/99) at 43-44. This affidavit, however, does not describe any specific legal action undertaken by TEACH which might be threatened by the MSA. Indeed, during the hearing, the activists emphasized how TEACH brought "Rite Aid to its knees essentially through public opinion and through the threat of some sort of adverse action by the City." N.T. (1/8/99) at 44 (emphasis added). This example thus does not illustrate how the MSA affects or limits access to the courts for public interest lawsuits during the next 25 years. [62] It thus serves to underscore that the activists' constitutional challenge is anticipatory. An analysis of the effect oil the MSA release on a particular public interest lawsuit must await the actual filing of such a suit.

The Pennsylvania Supreme Court emphasized this point when it concluded that the right to intervene based on a "legally enforceable interest" couldn't be maintained where "the alleged harm is at best conjectural." Pennsylvania Crime Commission Subpoena, 453 Pa. 513, 309 A.2d 401, 407 (1973). In Pennsylvania Crime Commission, individual policemen (retired and active duty) together with the Fraternal Order of Police (hereinafter "appellants" or "intervenors") sought to prevent the Police Commissioner from complying with a subpoena issued by the Pennsylvania Crime Commission in its investigation of charges of

widespread corruption in the Philadelphia Police Department. The court analyzed the right of these appellants to intervene in the subpoena enforcement proceeding under Pa.R.C.P. 2327(4). Id, 309 A.2d at 405-08.

The intervenors asserted a legally enforceable interest in these proceedings on various grounds—including an invocation of their constitutional rights. They argued that the records sought under the subpoena might endanger their well being since disclosure of their names, addresses, pictures and badge numbers could make them vulnerable to attack by those whom they had arrested. These records might also contain information about past infractions for which they had already been disciplined but which would unnecessarily embarrass them in their present jobs. Release of these documents, they also asserted, would violate a number of their constitutional rights and only through intervention would they be able to assert these rights. Id., 309 A.2d at 405.

In analyzing these facts within the parameters of Pa.R.C.P. 2327 (4), the Pennsylvania Supreme Court concluded that "[h]ere, we are not convinced that the interest asserted by appellants justified the lower court's granting intervention." Id., 309 A.2d at 406. First, the court concluded that an individual's "general interest in avoiding investigation does not, standing alone, afford him standing to object to the enforcement of a subpoena issued to a third party. Such a general interest is not of sufficient magnitude to allow intervention." Id., 309 A.2d at 406.

In reaching this conclusion, the court consciously struck a balance "between the protection of the rights of the individual and the avoiding of unnecessary restraint upon the State in the performance of its legitimate governmental purposes." Id., 309 A.2d at 407. In striking this balance, the Pennsylvania Supreme Court observed:

> In the present record it is clear that the alleged harm is at best conjectural. Admittedly, it will not flow as a direct consequence of the proceedings

> before us, but rather if it does in fact occur it would be in connection with other proceedings that may in some future time be instituted as a result of the information obtained. It must also be remembered that if these subsequent Proceedings become an actuality the appellant then would be provided ample opportunity to present any objections to the use of such information. Id., 309 A.2d at 407 (emphasis added).

The parallels between the intervenors in the Pennsylvania Crime Commission case and the instant petitioners are striking. Like the Crime Commission intervenors, the activists and Allegheny County raise anticipatory concerns about the effect of a third party's action (i.e., their negotiated settlement) on a future action that they might bring. In analyzing the present record, this court must also strike a balance between the state's legitimate governmental purpose in settling its lawsuit with the need to protect the rights of the petitioners from unjust consequences of this settlement. Since at this point the interests of the activists and Allegheny County in some future action "are at best conjectural," the effect of the MSA release provisions—if any—cannot be determined except in the context of that future proceeding. At that point, they would have ample opportunity to demonstrate why the release provisions do not apply. On the present record, the petitioners fail to present an actual case or controversy—a legally enforceable interest—ripe for disposition.

Thus, the County's concern that the release provisions "will render them vulnerable to dismissal of any future action they might bring against the tobacco defendants in pursuing a cause of action that already exists or might exist in the future" [63] fails to prevent an actual case or controversy ripe for disposition. Treski v. Kemper National Ins. Co., 449 Pa. Super. 620, 674 A.2d 1106, 1113 (1996) (because ripeness is a prerequisite for judicial review, the trial court did not err in dismissing an action where plaintiffs

failed to suffer an actual injury due to the insurers, misrepresentations as to the effect of the New Jersey "Deemer Statute.") See also Neshaminy Water Res. Auth. v. Com., D.E.R., 511 Pa. 334, 513 A.2d 979, 982 (1986) (action attacking DER regulations governing the method for determining acceptable phosphorous levels in water under the plaintiffs' jurisdiction was properly dismissed for failing to present a ripe case or controversy where plaintiff failed to show immediate and adverse impact on the waters); Roeder v. Hatfield Borough Council, 439 Pa. 241, 266 A.2d 691, 695-96 (1970) (the court properly quashed an appeal which sought to have a zoning amendment declared invalid where "absolutely nothing had happened under the ordinance to create a case or controversy ripe for judicial determination"); Borough of Marcus Hook v. Pa. Mun. Retirement Bd., 720 A.2d 803, 1998 Pa. Conmw. LEXIS 856 (1998) (where issue on appeal relates to hypothetical facts, the petition for review is dismissed for seeking an impermissible advisory opinion). As previously discussed in the context of the hospitals' petition, since this court has concluded that the petitioners' claim is not ripe, any discussion of their substantive constitutional rights would be an advisory opinion without legal effect. See, e.g., Gulnac v. South Butler County School District, 526 Pa. 483, 587 A.2d 699, 701 (1991) (trial court unnecessarily decided a constitutional issue in a vacuum, rendering "an advisory opinion which our courts are not entitled to do."). But cf. Reichley v. North Penn School District, 533 Pa. 519, 626 A.2d 123 (1993) (distinguishing the facts of Gulnac). See generally Gabel v. Cambruzzi, 532 Pa. 584, 616 A.2d 1364, 1369(1992) (where court lacks sufficient facto to issue anything but an advisory opinion it "will not break its tradition of refusing to author advisory opinions"); Milton Hershey Medical Center v. Doe, M.D., supra, 595 A.2d at 1293, quoting Okkerse v. Howe, 521 Pa. 509, 556 A.2d 827, 833 (1989) (an advisory opinion is without legal effect).

The activists and Allegheny County, in addition, argue that their interests are potentially affected by the MSA's indemnification provisions set forth in Section XII, relating to "Settling States' Release, Discharge and Covenant." They assert that even if future litigation determines that they are not precluded from bringing a suit against tobacco defendants because they are not "releasing parties" under the MSA, their legally enforceable interests will be barred by section XII (b), the "litigating releasing parties offset" [64] which provides in relevant part:

> If a releasing party (or any person or entity enumerated in subsection II (pp) without regard to the power of the Attorney General to release 'claims of such person or entity) nonetheless attempts to maintain a Released Claim against a Released Party, such Released Party shall give written notice of such potential claim to the Attorney General of the applicable Settling State within thirty days of receiving notice of such potential claim. . . . The released party may offer the release and covenant as a complete defense. <u>If it is determined at any Point in such action that the release of such claim is unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim), the following provisions shall apply:</u>
>
> (1) the Released Party shall take all ordinary and reasonable measures to defend the action fully. The released party may settle or enter into a stipulated judgment with respect to the action at any time in its sole discretion, but in such event, the offset described in subsection (b) (2) or (b) (3) below shall apply only if the released party obtains the relevant Attorney General's consent to such settlement or

stipulated judgment, which consent shall not be unreasonably withheld...

(2). . .

A. In the event of a settlement or stipulated judgment, the settlement or stipulated amount shall give rise to a continuing offset as such amount is actually paid against the full amount of such Original Participating Manufacturers' share. . . of the applicable Settling State's Allocated Payment until such time as the settled or stipulated amount is fully credited on a dollar-for-dollar basis. [65]

This offset provision, both the activists and Allegheny County argue, will harm them because it "will cause the Commonwealth of Pennsylvania to intervene in any such litigation against a tobacco defendant, to strengthen the tobacco defendants' defense" because any recovery awarded to the activists would be offset by the Commonwealth to its financial detriment. [66] During the intervention hearing, counsel for the activists elaborated on how this provision affected the activists' legally enforceable interests:

> Our legally enforceable interest, your Honor, is two folds. It is our interest in access to the Courts not just in a particular piece of litigation, but over the next 25 years in our access to the courts. And, secondly, our interest in being able to engage the tobacco industry as opposed to the state as a defendant in litigation. Those are our two legally enforceable interests that are being squelched essentially by this agreement and are going to basically make it very difficult for us to scare anybody after this. [67]

To remedy this ill, the activists asked the court to condition its approval of the MSA on the deletion of "of all

individuals and entities who are not political subdivisions of the Commonwealth" from the definition of "Releasing Parties." [68]

The Commonwealth objected to these contentions on various grounds. It argued, for instance, that the activists' concerns were based on hypothetical cases, which might be brought in the future. Thus they were not ripe. It also asserted that the MSA did not require the Attorney General to intervene on behalf of the tobacco industry "nor would he have any reason to do so." [69] Moreover, the release provisions would not affect plaintiffs who successfully sued the tobacco defendants for recovery; rather they would collect their full amount from the defendants. [70] The Commonwealth also suggests the dangers inherent in tampering with the definition of "releasing parties," because it is an essential, nonseverable term within Section XII of the MSA. Consequently, if it were modified prior to approval of the MSA, a team of Attorneys General would have to be appointed to renegotiate the terms. The tobacco manufacturers would be under no obligation to accept these terms and the MSA could be terminated as to Pennsylvania. [71]

The arguments of the Commonwealth were ultimately convincing. The interests asserted by the activists in being able to inflict financial harm on the tobacco manufacturers were speculative and remote. The exact implementation of the offset provisions is, at this point, conjectural. At the point where the activists actually trigger the off set provisions, their arguments could be analyzed within a concrete factual scenario. Moreover, the exact basis for—and nature of—their protest against these indemnification and offset provisions is unclear, partly because they cite no supporting authority of any kind. Thus, the activists assert:

> Against this background, Petitioners' position in this litigation is that the release provisions of the MSA effect an unconstitutional deprivation of Petitioners, right of access to the courts and that

> the indemnity provisions of the MSA, by which the citizenry indemnifies the tobacco companies even for awards of punitive damages, are directly contrary to the public policy of the State which expressly forbids insurance against such liabilities. Memorandum in Support of Activists' Petition to Intervene at 5.

It is thus not entirely clear whether the activists object to the offset provisions as a denial of their constitutional right of access of the courts or if they assert it is objectionable as "bad policy" which the court must help correct.

If they were raising constitutional objections, these would not be ripe until they can demonstrate an actual harm—at the very least that the offset provisions were triggered. In attacking the indemnity provisions, however, the activists appear to focus primarily on policy—as opposed to constitutional—concerns:

> The effect of this indemnity is to reverse the interests inter sese of the states and the petitioners. Without the indemnity, the states' interest and the petitioners' interest in the outcome of public interests claims against tobacco companies were the same; both wanted to maximize recovery; the petitioners could be viewed as supporters of the State. The indemnity reverses the lineup; the petitioners still want to maximize recovery, but now the state wants to minimize it. This converts the petitioners from supporters to opponents of the State, clearly, bad public policy that should have been (but was not) debated. [72]

The activists' request that this court modifies a hard fought settlement agreement based on its "policy" decisions—or theirs—is problematic for several reasons. First, the activists have not established the requisite standing. Second, their policy arguments do not constitute "legally enforceable interests" since they do not provide justiciable

standards for a court's review. The basic requirements for standing were recently outlined by the Pennsylvania Supreme Court in Sierra Club v. Hartman, 529 Pa. 454, 605 A.2d 309, 310 (1992):

> Generally, in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interest must be substantial, direct and immediate.

In outlining this test, the Sierra Club court emphasized that "rooted in this precept (of standing) is the notion that for a party to maintain a challenge to an official order or action, his rights must have been invaded or infringed." Id. There is also a general exception to this general rule "when the degree of causal connection is small but judicial review is necessary to protect against governmental action which otherwise would go unchallenged." Id., 605 A.2d at 310-11.

In applying these principles, the Pennsylvania Supreme Court concluded that the Sierra Club lacked standing to bring an action seeking mandamus and equitable relief for the Legislature's veto barring publication of a proposed air pollution regulation. The plaintiffs alleged deprivation of a constitutional right to clean air and proper functioning of the state government did not establish the group's standing to bring its action because these claims were "general in nature and arguably common to all Commonwealth citizens." Id., 605 A.2d at 311. Similarly, the tobacco activist's lack standing since in asserting that the indemnification provisions in the MSA infringe on their rights, they fail to establish either direct or immediate harm. See also In re Biester, 487 Pa. 438, 409 A.2d 848, 851 (1979) (standing requires an interest that is substantial, direct, and immediate); Pennsylvania Crime Comm. Subpoena, supra, 309 A.2d at 406 (an individual's general interest does not give him standing and "is not of sufficient magnitude to allow intervention"). Moreover, the effects of the

indemnification on the petitioners could be subject to review once the offset provisions have actually been triggered.

The activists' assertion that the settlement agreement represents bad policy because it forces the state to indemnify the tobacco industry and "converts the petitioners from supporters to opponents of the State" [73] similarly does not provide a "legally enforceable interest" for the activists' intervention nor does it provide a basis for this court's interference with the settlement process. The activists, in essence, are asking this court to make a political, policy decision—or to adopt theirs—in substitution of the Attorney General's judgment in entering into a settlement agreement.

This raises issues analogous to the political question doctrine. In analyzing whether a case raises a nonjusti-ciable political question, the Pennsylvania Supreme Court has emphasized that the political question doctrine derives from the separation of powers inherent in the federal constitution. See, e.g., Blackwell v. City of Phila. , 546 Pa. 358, 684 A.2d 1068 (1996) The Blackwell court further emphasized that "Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to political branches of the government for self-monitoring." Id., 684 A.2d at 1071. In analyzing whether a particular case presents such a non-justiciable political question, the Pennsylvania Supreme Court has repeatedly emphasized the criteria set forth by the United States Supreme Court in Baker v. Carr, 369 U.S. 186, 217 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial Policy determination of a kind

> clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncement by various departments on one question. Zemprelli v. Daniels, 496 Pa. 247, 436 A.2d 1165, 1169 (1981), quoting Baker v. Carr, 369 U.S. 186, 217 (1962). [74]

"The presence of any one of these elements," the Pennsylvania Supreme Court recently observed, "will prompt a court to refrain from considering the claim asserted. [75] To the extent that the "activists base their arguments against the indemnification provisions of the MSA on policy considerations concerning its potential effects, they failed to provide this court with "judicially manageable standards." They were seeking "an initial policy determination of a kind clearly for nonjudicial discretion." A different case would have been presented if they had invoked a statute or constitutional basis for review of an actual harm suffered. [76] As the Pennsyl-vania Supreme Court recently observed, "[p]olicy consi-derations" are "for the legislature and not the courts to determine and act on." Reichley v. North Penn School District, 533 Pa. 519, 626 A.2d 123, 129 (1993).

Under the Pennsylvania Constitution the Attorney General, an elected member of the Executive Department of the state government, is the "chief law officer of the Commonwealth" empowered "to exercise such powers and perform such duties as may be imposed by law." Pa.Const. Art. IV, ¶ 4.1 & Art. IV, ¶1. The legislature by statute provides that he shall "collect, by suit or otherwise, all debts" that are "due the Commonwealth." 71 P.S. ¶732-204(c). The exact scope of this authority, as previously

discussed, remains to be explored when concrete cases and controversies are posed. Policy arguments, alone, however, fail to provide an adequate standard for review at this point. If the Attorney General has engaged in a bad policy decision as the anti-tobacco activists contend, the remedy lies in challenging the Attorney General electorally or in filing lawsuits when and if a successful claim has resulted in a set off.

In concluding that neither the activists nor Allegheny County have established the requisite legally enforceable interest to intervene in this case, it is important to emphasize that this court is not concerned with any technical defects in the activists' or County's petition (such as its failure to attach a pleading as required by Pa.R.C.P 2328). [77] On the contrary, the critical factor is that the "legally enforceable interest" raised by the activists and County is based on events yet to occur. Interpretation of the scope of the release, in contrast, must evolve through actual case by case analysis as Judge Sosmon of Massachusetts eloquently observed in explaining her approval of the MSA:

> All the other Attorney Generals, and all the other public entities that have brought these kinds of cases in other jurisdictions, have accepted this settlement. That itself speaks volumes for the fact that many have perceived—all have perceived that this settlement is indeed wortn giving up their claims just as the Attorney General has decided.
>
> There is, and I do have some questions about the specific issue of the scope of the release that this Attorney General purports to grant in this agreement.
>
> As I read the Master Settlement Agreement, it seems to itself acknowledge that there is uncertainty as to the precise contours of that release because there is uncertainty as to the precise contours of the Attorney General's

authority, and presumably, those contours are different in differing states depending upon what authority those state's law grant their Attorney General.

As I read the document, that is an issue that would have to be addressed if and when such a suit were to arise. There would first be a series of definitional issues about any particular suit that was brought: was it a suit brought by a releasing party as that term is defined in the agreement; is it against a released party, as that term is defined; is it based on a released claim, as that term is defined? And if all of those questions were answered that, yes, one would then have to address the issue, if so, is that beyond this particular Attorney General's authority.

The Master Settlement Agreement does not purport to make that precise decision, or even to have terribly precise definitions at this stage. It would need to be addressed on a case-by-case basis. And I see no reason to hold off this settlement because of that particular problem. [78]

VI. Prejudice to the Settling Parties

The Pennsylvania Rules of Civil Procedure also provide that a petition to intervene may be refused if "the intervention will unduly delay, embarrass or prejudice the trial or adjudication of the rights of the parties. Pa.R.C.P. 2329 (3) (emphasis added). Allowing the petitioners to intervene in the final settlement stages of this action would both unduly delay and prejudice the resolution of the Commonwealth's lawsuit.

The MSA contains a complicated scheme for achieving "Final Approval." It provides, for instance, that " 'Final Approval' means the earlier of: (1) the date by which State-

Specific Finality in a sufficient number of Settling States has occurred; or (2) June 30, 2000." MSA, ¶ II (u). A key event in achieving "Final Approval," therefore, is the attainment of "State-Specific Finality" in a requisite number of states:

> For the purposes of this subsection (u), "State-Specific Finality in a sufficient number of Settling States" means that State-Specific Finality has occurred in both:
>
> (A) A number of Settling States equal to at least 80% of the total number of Settling States; and
>
> (B) Settling States having aggregate Allocable Shares equal to at least 80% of the total aggregate Allocable Shares assigned to all Settling States. MSA, ¶II (u).

For a specific state, the attainment of "State-Specific Finality" is thus crucial. According to the MSA, a state attains this degree of finality when the following occurs:

> (1) this Agreement (i.e. the MSAI and the Consent Decree have been approved and entered by the Court as to all Original Participating Manufacturers, or, in the event of an appeal from or review of a decision of the Court to withhold its approval and entry of this Agreement and the Consent Decree, by the court hearing such appeal or conducting such review;
>
> (2) entry by the Court has been made of an order dismissing with prejudice all claims against Released Parties in the action as provided herein; and
>
> (3) the time for appeal or to seek review of or permission to appeal ("Appeal") from the approval and entry as described in subsection (1) hereof and entry of such order described in subsection (2) hereof has expired; or, in the event of an Appeal from such approval and entry, the Appeal has been dismissed, or the

> approval and entry described in (1) hereof and the order described in subsection (2) hereof have been affirmed in all material respects by the court of last resort to which such Appeal has been taken and such dismissal or affirmance has become no longer subject to further Appeal (including, without limitation, review by the United States Supreme Court). MSA, ¶ 11(ss).

During the intervention hearing, Attorney General Fisher emphasized how critical it was that Pennsylvania reach "state specific finality as soon as possible so that it could benefit from the settlement recovery. He urged that "it's very important for the people of Pennsylvania to be able to move forward." N.T. (1/12/99) at 85. More specifically, "it's so important for this court to allow that time period to begin so that the lawmakers and the governor can make the beat decisions possible, as quickly as possible, as to how to utilize the provisions of this agreement for the public health of Pennsylvania." Id. at 86. Failure to attain state-specific finality, he warned, "could mean that Pennsylvania would fall behind in receipt of the monies, which hopefully the general assembly and the governor will use for public health purposes." Id.

Allowing intervention during this final stage of the Commonwealth's lawsuit would inevitably have caused delay. The petition to intervene by the activists, for instance, posed a particular threat of delay since they sought to intervene not only as individuals but also as a class. The Pennsylvania Rules of Civil Procedure impose very precise requirements for the certification of a class that could seriously delay the attainment of "State-Specific Finality" in Pennsylvania. The rules require that a class action complaint be filed and that the case be assigned to a particular judge. Pa.R.C.P. 1703. The responding parties may then file Preliminary Objections, Pa.R.C.P. 1705 or an Answer, Pa.R.C.P. 1706. After the pleadings, the court must then decide whether the class should be certified. Pa.R.C.P.

1707-1710. See also Janick v. The Prudential Ins. Co., 305 Pa. Super 120, 451 A.2d 451, 455 (1982) ("A court may not make the initial class action determination until after the close of pleadings to ensure that the class proponent is presenting a non-frivolous claim capable of surviving preliminary objections). Significantly, if a court denies class certification, that order can be appealed with all the inherent delays of that process. Dilucido v. Terminix, 450 Pa. Super. 393, 676 A.2d at 1237, 1239, app. denied, 546 Pa. 655, 684 A.2d 557 (1996).

Allowing intervention at this point in the settlement process would not only unduly delay the resolution of the settling parties, lawsuit. Such delay itself might also jeopardize the agreement, thereby severely prejudicing all the settling parties. This prejudice is an especially serious concern in light of the petitioners' failure to establish the requisite "legally enforceable interests" for intervention. For these reasons as well, therefore, the petitions to intervene were denied.

VII. Approval of the Consent Decrees

The Commonwealth and Tobacco Defendants asked this court to approve their settlement and to enter a Consent Decree. This Consent Decree creates continuing jurisdiction with this court for consideration of any interpretation or enforcement issues that may arise under the agreement as they relate to Pennsylvania. It would not, however, require the court "to actively monitor compliance with the settlement." [79]

There are several reasons why the parties seek court approval. First, the Master Settlement Agreement requires uniform approval procedures throughout the various settling states. Moreover, the parties emphasize that public law settlements spanning many years are frequently complicated documents that benefit from continuing oversight by a court familiar with the issues. Moreover, "a court that maintains

continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures."

A consent decree is arrived at through negotiation and settlement. In re John W., 300 Pa. Super. 293, 446 A.2d 621, 623 (1982). By its very nature, therefore, a consent decree "requires the understanding of or ratification by the respective parties." Archbishop v. Karlak, 450 Pa. 535, 299 A.2d 294, 297 (1973). As the Pennsylvania Supreme Court has observed, a consent decree "is not a legal determination of the matters in controversy; it has the binding force of, a legal determination on the parties thereto only." Sabatine v. Comm, 497 Pa. 453, 442 A.2d 210, 212 (1981). [81].

In essence, a consent decree is a contract that binds the parties to its terms and a court may not modify it absent fraud, accident or mistake. Univ. Builders Supply Inc. v. Shaler Highlands Corp., 405 Pa. 259, 175 A.2d 58, 61 (1961). See also Jones Memorial Baptist Church v. Brackeen, 416 Pa. 599, 207 A.2d 861, 863 (1965); Dravosburg Housing Assoc. v. Borough of Dravosburg, 71 Pa. Cmwlth. 144, 454 A.2d 1158, 1161 (1983). But even though a consent decree is not a legal determination by the court of matters in controversy . . . it binds the parties with the same force and effect as if a final decree has been rendered after a full hearing upon the merits." Armstead v. Dandridge, 257 Pa. Super. 415, 390 A.2d 1305, 1310 (1978) (citations omitted); Pennypack Woods Home Ownership Assoc. v. Regan, 298 Pa. Super. 170, 444 A.2d 715, 716 (1982). Because of its nature as a binding contract, it is imperative that each party has fully consented to it. Pa. Human Relation Comm'n v. Graybill, 482 Pa. 143, 393 A.2d 420, 423 (1978) Com. of Pa. v. Rozman. 10 Pa. Cmwlth. 133, 309 A.2d 197, 199-200 (1973).

In light of these principles, this Court approved the Consent Decrees that all the parties endorsed in their joint motion to approve the settlements and consent decree. This complicated settlement was reached after months of vigorous arms-length negotiations. It spares all parties incalculable

expense and the uncertainties inherent in such complex litigation. The claims asserted by the Common-wealth's ten-count complaint brought in its capacity as sovereign, and as *parens patriae* on behalf of all of its citizens, were often novel and subtle. Resolution of such fundamental questions as whether subrogation is the exclusive statutory remedy for recouping the state's Medicaid expenditures was far from clear-cut as evidenced by conflicting precedent from other states. Compare Illinois v. Philip Morris et al. No. 96L13146, slip op. at 7 (Illinois Cir. Ct., Cook Cty. Nov. 13, 1997) with Iowa v. R. J. Reynolds. No. CL71048, slip op. at 6-7 (Iowa Dist. Ct., Polk Cty. Aug. 26, 1997). While other state courts in approving the MSA have noted the risks the Attorneys General faced with their cases, [83] the tobacco defendants faced the formidable task of defending in 46 states actions raising complex issues that had to be fought out in a maze of varying state statutes and precedent.

Not only does the settlement spare the parties the expense and risks of continuing litigation; it accords with the strong judicial policy in Pennsylvania favoring voluntary settlements. See, e.g. Muhammad v. Strass-burger, 526 Pa. 541, 587 A.2d 1346, 1349 (1991), cert. denied, 502 U.S. 867 (1991) ("A long standing principle of our courts has been to encourage settlements"). But cf. McMahon v. Shea, 547 Pa. 124, 688 A.2d 1179 (1997) (limiting Muhammad to its facts). See also Rothman v. Fillett, 503 Pa. 259, 469 A.2d 43, S46 (1983) ("There is a strong Judicial policy in favor of parties voluntarily settling lawsuits"). For one thing, settlements assure more expeditious compensation for those who are injured since they avoid the inevitable delays of the appellate process. In addition, settlements help reduce overcrowded courts, thereby shortening a litigant's wait for a trial date. They also reduce the burdens and expenses in maintaining court systems. Muhammad, supra, 587 A.2d ast 1350. See also Rothman v. Fillett, supra 469 A.2d at 546. Not surprisingly, the Pennsylvania Supreme Court observed, the astute lawyer Abraham Lincoln advised:

"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and wastes of time. [84]

Conclusion

The attorneys general—in launching their landmark lawsuits against the tobacco industry—necessarily undertook the unpredictable financial risks borne by all litigants. The settlement agreements eliminate these risks—while affording undeniable benefits to the citizens of Pennsylvania. The MSA will thus provide billions of dollars to the Commonwealth to be dedicated to the public good. The voluntary restraints that the tobacco defendants have accepted on their powers of persuasion—especially as directed to the youth of Pennsylvania—may also afford inestimable benefits. For these reasons, this court entered the Consent Decrees and approved the MSA and STMSA on January 13, 1999. To have done otherwise, would have been a manifest abuse of discretion.

*

NOTES:

1. During the intervention hearing, counsel for one of the tobacco defendants, Philip Morris, likewise emphasized that the release language in the MSA, especially in section 12, "goes to the heart of why the defendants in this case have paid the very large amount of money and made all of the other agreements, the non-economic agreements that they have made." N.T. (1/12/99) at 61-62.

2. At the hearing on January 12, 1999, counsel for the Commonwealth made the following representation with no objection by any party present: "Moreover, with regard to what Mr. Fox was just indicating, the MSA, in no sense, is

barred to private litigants who are coming in arguing on their own individual claims with regard to the tobacco defendants. There are many individuals, many claims that are not going to be barred at all by this MSA. And were the recovery—if there is a recovery, it will indeed be against the tobacco defendants, themselves, not against this fund being accumulated by the Commonwealth that the attorneys general obtained for the various statements (sic.)." N.T. (1/12/1999) at 58 (emphasis added).

3. At the hearing, the court posed the question of whether the MSA would limit actions to "enjoin certain conduct or activity assuming one would have a right or standing to bring such an injunction?" N.T. (1/8/99) at 58. Counsel for both the Commonwealth and defendant Philip Morris concurred that the release applied only to certain monetary claims. See N.T. (1/8/99) at 62-63.

4. The tobacco settlement negotiations began in the Spring of 1998. According to the Commonwealth, they were "hard fought, and at times were contentious. Indeed, as was well publicized in the press, at different times during the negotiations, parties walked away from the negotiations only to return later and resume bargaining." Commonwealth's Memorandum in Support of Joint Motions to Approve the Settlements (hereinafter "Commonwealth's Settlement Memorandum") at 5-6.

5. For the execution dates of the agreements, see MSA, II (aa) and STMSA, II (x). But see Commonwealth's Answer to the Petition to Intervene of Allegheny General Hospital at ¶ 5 (stating that MSA was executed on November 16, 1998).

6. The MSA submitted to this court was signed by State Attorneys General or other State representatives as well as by Philip Morris Inc., R. J. Reynolds Tobacco, Co.; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Co.; and

the Liggett Group, Inc. The STMSA was negotiated with the United States Tobacco Company.

7. See Preamble, ¶ 4 to the MSA Consent Decree. Complaint, Com. v. Philip Morris et al., April 1997, No. 2443 (Phila. Ct. Cm. Pleas) at 1 2.

8. MSA, XIII (b)(1)(B) & Ex. L.

9. The "tobacco defendants" who joined in this motion were Brown & Williamson Tobacco Corp (individually and as successor by merger to the American Tobacco Company); Lorillard Tobacco Company; Philip Morris Inc.; R. J. Reynolds Tobacco Company and the Liggett Group, Inc.

10. Hospitals' Memorandum of Law at 5.

11. For a brief discussion of the City's position, see note 62 infra.

12. See, e.g., Petition to Intervene filed by Citizens for Consumer Justice, Coalition for Tobacco Free Pennsylvania, American Academy of Pediatrics, Clean Air Council and Smoke-Free Educational Services at 2 ("Petitioners do not seek to block the proposed settlement in this petition") (joining with other petitioners ACSH, Sklaroff, Godshall, Barg, SmokeFree Pennsylvania and PennPIRG) During the intervention hearing, the hospitals' counsel stated: "And we are not asking to upset the master settlement agreement or proposed consent decree, all we are asking for is an additional contemporaneous order with an additional finding by the Court that we are not covered by the language." N.T. (1/8/99) at 10.

13. Because the petitions to intervene addressed only the MSA, this court will likewise limit its discussion of the "settlement agreement" to the MSA.

14. Abby Goodnough, "Law Limiting Cigarette Ads is Overturned," N. Y. Times, December 16, 1998 at Bl. See MSA, ¶III (d) ("Elimination of Outdoor Advertising and Transit Advertisements"). Similarly, Judge Sosman of the Commonwealth of Massachusetts Superior Court, in approving the MSA, emphasized that it achieved by compromise advances unavailable through court orders: "In many respects, whatever their weaknesses, the injunctive provisions in this Consent Decree and in this Master Settlement Agreement go beyond what I believe I could have done even had I found ongoing unfair and deceptive trade practices. I would have had to deal, obviously, with very significant First Amendment concerns in drafting any orders with regard to outdoor advertising, sponsorship of sports events, use of sports' figures names in brand names, and the whole host of detail that is contained in this MSA." Com. of Mass. v. Philip Morris et al., No. 95-7378 (Sup. Ct.) Transcript (12/3/98) at 16-17, Ex. A to Philip Morris's Answer to the Petition to Intervene of Sklaroff et al.

15. Commonwealth's Settlement Memorandum at 2 & n. 1.

16. Id. at 4-5.

17. See id. At 6 (citing Pa. R. C.P. 229).

18. Commonwealth's Settlement Memorandum at 6.

19. Commonwealth's Settlement Memorandum at 5. The Courts that had approved the Consent Decree as of December 10th were New Jersey, Ohio, Michigan, Illinois, Maine, Massachusetts, Connecticut, Maryland, Wisconsin, Iowa, Kansas, California, Oklahoma, Colorado, Arizona, Montana, Idaho, Washington, Oregon and Georgia. Id. at 5, n.2.

20. Hospitals' Petition to Intervene at 7.

21. Hospitals' Petition to Intervene at 4.

22. Hospitals' Memorandum at 3 (emphasis added). During the hearing, the hospitals, counsel explained that their primary concern was that the MSA release provisions would bar their Allegheny County action: "we would be very happy just to be told releasing bar provisions don't apply for us, and we will go off and litigate our cause of action somewhere else.' N.T. (1/8/99) at 15.

23. The specific provisions the hospitals address within the MSA include its definition of "Claims," MSA SSII (n), "Released Claims," MSA ¶II (nn), "Releasing Parties," MSA ¶II (pp), its "Release, Discharge & Covenant Provisions," 11 MSA XII, and paragraph VII of the Consent Decree. Hospitals' Memorandum at 9-12.

24. Hospitals' Memorandum at 9, quoting MSA, ¶II (n) (emphasis in hospitals' petition).

25. Hospitals' Memorandum at 9, quoting MSA, ¶II (nn) (emphasis in hospitals' petition).

26. Hospitals' Memorandum at 11 (quoting MSA, ¶XII (b)) In quoting this section, the hospitals chop off sentences and omit passages that could prove relevant if reviewed in the context of a specific case. This provision, for instance, also states that the Released Party will defend any action against it "[i]f it is determined at any point in such action that the release of such claim is unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim). . ." MSA, ¶XII(b)(1).

27. Hospitals' Petition to Intervene, Ex. A, Intervenors' Complaint in Action for Declaratory Judgment, ¶¶ 3-4.

28. Zimmerman, 673 A.2d at 23 (emphasis added).

29. Zimmerman, supra, 673 A.2d at 24. Accord Avrich v. General Accident Ins. Co., 367 Pa. Super. 248, 532 A.2d 882 (1987) (declaratory judgment petition dismissed for failure to present an actual controversy where it sought a determination of the defendant-insurers' obligation to pay prior to the entry of any judgment); Boyle v. Com., DOT, 151 Pa. Cmwlth. 430, 617 A.2d 70 (1992) (declaratory judgment action dismissed which sought a determination that the statutory cap on a recovery from DOT is unconstitutional because no judgment had been entered in favor of petitioner). But see Bromwell v. Michigan Mutt. Ins. Co., 716 A.2d 667, 670 1998 Pa. Super. LEXIS 1928**8 (1998) (declaratory judgment action to determine the scope of liability of defendants, insurers could be maintained where settlement agreement specifically provided for such an action to determine relative liability).

30. See, e.g. N.T. (1/8/99) at 37.

31. Hospitals' Memorandum at 25-26; N.T. (1/8/99) at 21.

32. Hospitals' Memorandum at 27; N.T. (1/8/99) at 22-23.

33. Hospitals' Memorandum at 12. See also N.T. (1/8/99) at 16.

34. N.T. (1/12/99) at 71. It should be noted that defense counsel also steadfastly argued that any discussions of the effect of the release on the hospitals' claim were premature.

See, e.g. N.T. (1/8/99) at 38. See generally N.T. (1/12/99) at 67, 63. For a discussion of the scope of a consent decree, see Section VII infra. Counsel for the Commonwealth likewise affirmed that court approval of the consent decree did not extend the attorney general's inherent power to release claims by Allegheny County:

> THE COURT: Do those orders contemplate this court approving the attorney general's authority to compromise county claims?
> Mr. Fox: Not at all, your Honor. What we always seem to lose sight of, here, is that paragraph pp of the MSA, which is the definition of releasing parties, clearly and expressly states that "That release is only applicable to the full extent of the power of the signatories hereto to release past, present and future claims." N.T. (1/12/99) at 38 & 39.

35. Response of Commonwealth to the Hospitals' Petition at ¶12.

36. Complaint, Commonwealth v. Philip Morris et al., April Term 1997, No. 2443 (Phila. Ct. Common Pleas), ¶15.

37. Id. at ¶¶3-4.

38. Id. at ¶14.

39. Complaint, Allegheny General Hosp. et al v. Philip Morris et al., (Allegheny Cty) ¶¶ 1-4. See also N. T. (1/8/99) at 25.

40. This opinion addresses the Allegheny County Petition and Memorandum filed on January 7, 1999.

41. An amended petition to intervene was filed December 2, 1998 by Robert B. Sklaroff, William T.

Godshall, Jeffrey Barg, SmokeFree Pennsylvania and PennPIRG. A petition to intervene was filed on December 8, 1998 by the American Council on Science and Health. On December 11, 1998 the Citizens for Consumer Justice, Coalition for A Tobacco-Free Pennsylvania, American Academy of Pediatrics, Clean Air Council, and Smoke Free Educational Services filed a petition to intervene. Finally, On January 6, 1999, a petition to intervene was filed by the American Association of Public Health Physicians; Tri-County Tobacco Free Coalition, Inc.; American Society of Addictive Medicine; Coalition for Leadership, Education and Advocacy for Recovery; and Peoples Medical Society.

42. In their memorandum, these petitioners characterized themselves as "private anti-tobacco activists." At the hearing, their counsel acknowledged the similarity of their positions when asked if they should be treated as a group: "That's right, your Honor. They're essentially the same and we are in this together." N.T. (1/8/99) at 40. These activists filed 4 separate petitions, which are virtually identical. For ease of citation, references to the petitions will be to the amended petition filed at control number 112221 by Robert Sklaroff, William Godshall, Jeffrey Barg, Smokefree Pennsylvania and PennPIRG (and responses thereto).

A procedural issue raised by the activists' petition is the request to intervene on behalf of a similarly situated class pursuant to Pa.R.C.P. 1702. Petition by Sklaroff et al. at ¶¶6-10. Certification of a class action can pose considerable time delays, which could prejudice the settling parties.

43. Counsel for the activists emphasized their concern not only with the definition of "releasing parties" but also "what we are complaining about is the offset provision, which takes away our ability to sue or threaten to get a punitive damages award against the tobacco companies." N.T. (1/8/99) at 64-65. See also N.T. (1/12/99) at 80-81.

44. See, e.g., Allegheny County's Petition at ¶1; Petition to Intervene of Sklaroff et al. at ¶11.

45. See, e.g., petition to intervene by Sklaroff at ¶¶11; Petition by Allegheny County at ¶¶ 1.

46. Petition by Allegheny County, ¶la and Memorandum at 2.

47. Petition to Intervene of Sklaroff et al. at ¶11.

48. Commonwealth's Response to the Petition of Allegheny County at ¶l.

49. N.T. (1/12/99) at 41-42.

50. N.T. (1/12/99) at 42-43 (emphasis added).

51. N.T. (1/12/99) at 87-88 (emphasis added). Counsel for the Commonwealth likewise stated: "We do not believe that our settlement agreement, in any way, compromises their ability to pursue their claims, any of those groups, and we certainly do believe it's in the best interest of the Commonwealth." N.T. (1/12/99) at 47.

52. Petition to Intervene of Sklaroff et al. at ¶ 11(b).

53. Memorandum in Support of Activists' Petition to Intervene at 5.

54. Commonwealth's Memorandum in Response to the Petition to Intervene of Sklaroff at 11 (quoting MSA, II (pp)).

55. Id. at 11.

56. Id.

57. Commonwealth's Answer to the Petition to Intervene of Sklaroff et al. at ¶ 6.

58. Commonwealth's Memorandum in Response to the Petition to Intervene of Sklaroff et al. at 12.

59. N.T. (1/8/99) at 42.

60. N.T. (1/8/99) at 43.

61. See Affidavit of Jeffrey Barg (1/9/99), Ex. B1 to Activists' Memorandum. In this affidavit, Mr. Barg describes the campaign against Rite Aid as follows:

> Most major tobacco retailers in the City took steps to comply with the law, but the Rite Aid Pharmacy chain openly flouted the tobacco placement provisions of the law. TEACH encouraged and aided the City in obtaining Rite Aid's compliance with the law. Without the threat of legal action, it is doubtful this could have been accomplished. The Multistate Settlement Agreement bars future legal action not only against cigarette manufacturers, but also against distributors, retailers, employees and others. If this agreement had been in force last year, the City's and TEACH's hands would have been tied in its struggle with Rite Aid." Barg Affidavit, ¶14 (emphasis added).

Significantly, Mr. Barg does not indicate that any specific legal action was taken against Rite Aid. Instead, he emphasizes the beneficial effect of a "threat" of a lawsuit. He also assumes and anticipates that the MSA would bar a future (but as yet unfiled) lawsuit, despite the inherent limitations within the MSA release and the absence of any court ruling whatsoever as to its scope in an actual case or controversy.

62. To the extent that the activists might be suggesting that the MSA would deprive them of the City's supportive legal action, the City of Philadelphia, to the contrary, argues forcefully that the MSA does not impair its rights to assert any claims against the "Released Parties" because, *inter alia*, the Attorney General lacks the authority "to release claims on behalf of the City." Hence, its decision to file an amicus briefs rather than a petition to intervene. See Brief of City of Philadelphia as Amicus Curiae at 4.

63. Allegheny County's Petition at ¶la.

64. See, e. g., Petition to Intervene of Sklaroff et al. at ¶12 and Petition to Intervene of Allegheny County at ¶2.

65. MSA, ¶ XII (b), as quoted by Petition to Intervene by Sklaroff at 1 12 and Petition to Intervene by Allegheny County at 2 (emphasis added in petitions).

66. Petition to Intervene of Sklaroff et al. At ¶ 12 (b) Allegheny County Petition at¶ 2.

67. N.T. (1/8/99) at 51

68. Petition to Intervene of Sklaroff et al. at ¶ 13.

69. Commonwealth's Answer to the Motion to Intervene of Sklaroff et al at ¶¶ 12 & 6.

70. Commonwealth's Answer to Petition to Intervene by Sklaroff at ¶12.

71. Commonwealth's Memorandum in Opposition to the Petition to Intervene of Sklaroff et al. at 7, n. 5 (citing MSA, ¶ XVIII (o)

72. Activists' Memorandum at 4, n.4 (emphasis added).

73. Activists' Memorandum at 4, n.4. See also N.T. (1/8/99) at 53 & 66.

74. The Pennsylvania Supreme Court has relied on the Baker v. Carr analysis in other cases where it considered whether a particular case presented a nonjusticiable political question. See, e.g., Blackwell v. City of Philadelphia, 546 Pa. 358, 684 A.2d 1068, 1071 (1996); Thornburgh v. Lewis, 504 Pa. 206, 470 A.2d 952, 955 (1983); Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698, 706 (1977).

75. Blackwell, supra, 684 A.2d at 1071.

76. The Pennsylvania Supreme Court, as the arbiter for determining the presence of a nonjusticiable political question, has emphasized the essentially narrow scope of this exception to judicial review in Pennsylvania: "We believe that proper consideration of the state judiciary's function in our federalist system of government militates toward a construction of the Pennsylvania Constitution which will minimize the number of federal constitutional issues insulated from state court review by the application of the political question doctrine in Pennsylvania." Sweeney v. Tucker, 473 A.2d 493, 375 A.2d 698, 710 (1977) (emphasis added). Thus, while the Pennsylvania Supreme Court on various occasions has considered whether a particular issue is a nonjusticiable political question, it frequently concluded that it could exercise review based on a constitutional or statutory provision. See, e.g., Sweeney, supra, 375 A.2d at 712 (the expulsion of a state House member was subject to judicial review where a due process claim was raised); Thornburgh v. Lewis, supra, 470 A.2d at 956-57 (the issue of whether the executive branch of the Commonwealth may be required to supply budgetary information at the request of the Minority Chairman of the Senate Appropriations

Committee was subject to judicial review based on constitutional and statutory provisions); Zemprelli v. Daniels, supra, 436 A.2d at 1168-70 (the validity of an executive appointment by the Governor as voted on by the Senate was subject to judicial review based on the Constitution). But see Blackwell v. City of Philadelphia, supra, 684 A.2d at 1069 (the firing of a Philadelphia City Councilwoman's special assistant was a nonjusticiable political question because it implicated the internal rules of the Philadelphia City Council).

77. Moreover, during the hearing, the Commonwealth specifically waived its objections to any technical defects in the County's petition. See N.T. (1/12/99) at 60-61. A petition to intervene should not be dismissed for purely technical defects since petitioners should be granted leave to amend. See, e.g., Esso Standard Oil Co. v. Taylor, 399 Pa. 324, 159 A.2d 692, 695 (1960); Hayes v. Sch. Dist. of Pitts., 33 Pa.Cmwlth. 71, 381 A.2d 193, 195 (1977).

78. See Com. of Mass. v. Philip Morris et al., No. 95-7378 (Mass. Sup. Ct), Transcript (12/3/98) (Sosman, J.) at 21-22 (emphasis added), attached as Ex. A to Philip Morris's Answer to the Petition to Intervene of American Council on Science and Health.

79. Commonwealth's Settlement Memorandum at 6-7.

80. Commonwealth's Settlement Memorandum at 6-8 (quoting Local No. 93, Int'l Ass'n of Firefighters v. Cleveland. 478 U.S. 501, 523-24 n.13 (1986) (citations omitted).

81. Justice Brennan also emphasized this limited scope of a consent decree when he observed: "of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a*

fortiori may not impose duties or obligations an a third party without that party's agreement." Consequently, "a court may not enter a consent decree that imposes obligations on a party that may not consent to the decree." Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

82. Commonwealth's Settlement Memorandum at 5.

83. As Judge Anna Brown of Oregon noted: "The State had significant risk, and, I believe, recognized that, as did the other Attorneys General on these novel theories. It's extremely important that there has been garnered a benefit out of extremely risky litigation in terms of a consummate analysis." State of Oregon v. American Tobacco et al., No. 9706-4457 (Cir. Ct. Oregon, Multnomah Cty), N.T. 11/30/98 at 49, presented as Ex. C to Commonwealth's Response to Petition to Intervene of Sklaroff et al.

84. Muhammad v. Strasburger et al., supra. 587 A.2d at 1351 (quoting Abraham Lincoln as quoted in Burger, "Isn't There a Better Way?" 68 ABAJ 274, 275 (1982)).

Date: February 26, 1999

BY THE COURT:

s/ JOHN W. HERRON, Judge

APPENDIX B
PA Commonwealth Court Opinions

[This document has been reformatted to minimize potential confusion (because two cases were decided concomitantly). To follow are: Caption, Judges, Orders dismissing Allegheny County (8/9/1999) & Sklaroff (8/10/1999) appeals, Opinions of Judge Leadbetter (Majority) and Judge Kelley (Minority).

*

ARGUED: April 14, 1999 [There was no oral argument.]

COMMONWEALTH OF PENNSYLVANIA
by D. MICHAEL FISHER in his official capacity as
Attorney General of the Commonwealth of Pennsylvania
v.
PHILLIP MORRIS INCORPORATED; R. J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, PLC.; THE AMERICAN TOBACCO COMPANY, INC., c/o BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.

BEFORE: HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE ROCHELLE S. FREEDMAN, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER,
Judge

Orders:

No. 455 C.D. 1999
No. 456 C.D. 1999
No. 457 C.D. 1999
No. 460 C.D. 1999
No. 895 C.D. 1999

THE COUNTY OF ALLEGHENY,
Appellant

AND NOW, this 9th day of August, 1999, upon consideration of the praecipe of appellant Allegheny County to discontinue appeals, which is treated as a motion to discontinue, the motion is GRANTED and the above appeals of Allegheny County shall be marked discontinued and ended, with prejudice.

/s BONNIE BRIGANCE LEADBETTER, Judge

*

NO. 467 C.D. 1999

ROBERT B. SKLAROFF, M.D.,
Appellant

AND NOW, this 10th day of August, 1999, the order of the Court of Common Pleas of the First Judicial District of Pennsylvania, Civil Trial Division, in the above captioned matter, is hereby affirmed.

s/ BONNIE BRIGANCE LEADBETTER, Judge

{both stamped in the following fashion}
"Reported" and "Certified from the Record and Order Exit"
/s Deputy Prothonotary - Chief Clerk Mr. C. R. Hostutler

Majority (Leadbetter) Opinion [in re: both Orders]

Appellant Robert B. Sklaroff, M.D., appeals from the order of the Court of Common Pleas of the First Judicial District of Pennsylvania, Civil Trial Division, denying his petition to intervene in an action commenced by the Commonwealth of Pennsylvania against various defendants involved in, *inter alia*, the manufacturing, sale, distribution or promotion of tobacco products. [1] After review, we affirm.

In April 1997, the Commonwealth filed its lawsuit against the various tobacco entities seeking damages for economic injuries to the Commonwealth as well as injunctive relief. Thereafter, in November 1998, the Commonwealth settled its lawsuit against the tobacco defendants by executing two agreements, namely the Master Settlement Agreement (MSA) and the Smokeless Tobacco Master Settlement Agreement (STMSA). [2] The terms of the MSA required each Settling state to file a consent decree with the appropriate state court. Consequently, on December 11, 1998, the Commonwealth and the tobacco defendants filed a joint motion to approve the Settlement and consent decrees. Before and after the joint motion was filed, various Parties, including Dr. Sklaroff, an anti-tobacco activist, filed petitions to intervene in the Commonwealth's action. [3] Following several days of hearings and arguments by counsel, the trial court denied the various petitions to intervene. The present appeal followed. [4]

In his papers filed both with the trial court and this court, Dr. Sklaroff seeks to represent the public interest and seeks relief on behalf of the public at large. [5] However, as the trial court noted, a general interest common to all citizens is insufficient to confer standing. In Sierra Club v. Hartman, 529 Pa. 454, 605 A_2d 309 (1992), our Supreme Court emphasized the basic precepts of standing:

> Generally, in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interest must be substantial, direct, and immediate.

Id. at 456, 605 A.2d at 310, quoting Sprague v. Casey, 520 Pa. 38, 43, 550 A.2d 184, 187 (1988). Dr. Sklaroff's desire to represent the public interest is insufficient to confer standing, particularly where, as here, other entities such as the Commonwealth do have a direct, substantial and immediate interest and are in fact vigorously litigating on behalf of the public. Therefore, we affirm the denial of Dr. Sklaroff's petition to intervene on the basis of the opinion of the Honorable John Herron. See Commonwealth of Pennsylvania, by Michael Fisher, in his Official Capacity as Attorney General of the Commonwealth of Pennsylvania v. Phillip Morris, April Term 1-997, No. 2443 (C.P. First Judicial District of Pennsylvania, filed February 26, 1999), _____ D & C 4th _____ (1999). [6]

*

NOTES:

1. Specifically, the Commonwealth sued the following: Phillip Morris, Inc.; R. J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, PLC, The American Tobacco Company, Inc.; Lorillard Tobacco Company; Liggett Group, Inc.; United States Tobacco Company; The Tobacco Institute Inc.; The Council for Tobacco Research - USA, Inc.; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc.

2. The Commonwealth's action was just one of many nationwide and, eventually, 46 states, the District of

Columbia, and five territories executed these same two agreements.

3. In addition to Sklaroff, Allegheny County, various non-profit hospitals and other activists sought to intervene.

4. Originally, both the Dr. Sklaroff and Allegheny County appealed from the trial court's denial of their petitions to intervene. However, at this time, only Dr. Sklaroff's appeal remains before the court.

5. For instance, Dr. Sklaroff, who sought to intervene with other activists, avers in his amended petition that approval of the MSA may affect legally enforceable interests of the petitioners in that:

> petitioners are individuals and organizations committed to tobacco control and who work toward that and in ways which include, either actually or potentially, public interest litigation against the tobacco defendants to enforce existing tobacco control measures or for compensation for tobacco-related injury to the citizenry of Pennsylvania as a whole . . . .See Exhibit A to Brief for Appellees Philip Morris Incorporated, et al.

6. In his appellate brief, Dr. Sklaroff contends that the trial court failed to adequately address his request and averments regarding permission to intervene on behalf of a class. However, since Dr. Sklaroff lacks standing to intervene himself, *a fortiori* he does not have standing to represent a OEM of class of similarly situated individuals.

/s BONNIE BRIGANCE LEADBETTER, Judge

*

I respectfully dissent.

On April 21, 1997, the Commonwealth of Pennsylvania, acting by and through Attorney General D. Michael Fisher, filed the instant complaint in the Court of Common Pleas of Philadelphia County (trial court) asserting various claims for monetary damages and equitable and injunctive relief against the named Defendants. In the complaint, the Attorney General alleged that:

> [H]e brings this action pursuant to his authority under 71 Pa.C.S. [sic] § 732-204 [i], 73 Pa.C.S. [sic] § 210-4 [ii] and 73 Pa.C.S. [sic] § 201-8 [iii], and in parens patriae [iv] on behalf of the citizens of Pennsylvania, including its children and adolescents, to protect their health and welfare, and to recover damages which the Commonwealth and its citizens have sustained as a result of the unlawful and concerted action of the defendants, as well as injunctive relief.

Complaint, p. 8. The Attorney General sought both monetary damages and injunctive relief flowing from various claims relating to the manufacturing, sale, distribution or promotion of tobacco products.

On November 23, 1998, forty-six states (including Pennsylvania), the District of Columbia, and five territories executed two agreements, the Master Settlement Agreement (MSA) and the Smokeless Tobacco Master Settlement Agreement (STMSA), to settle the lawsuits filed in these jurisdictions against the Defendants.[v] The MSA contains detailed formulas outlining the timing and amounts to be paid by the Defendants into an escrow account to then be distributed to each of the settling states, a total of $206,000,000,000.00 to be paid over twenty five years.[vi] Pennsylvania's share of the initial recovery under the MSA totals $11,260,000,000.00, with the potential for payments of over $500,000,000.00 per year thereafter. This share of the

monetary settlement comprises the third largest recovery among the settling states.[vii] In addition, under the MSA the Defendants agreed to make concessions in the business practices, advertising and marketing of tobacco products.[viii]

In exchange for this monetary settlement, each of the settling states agreed, *inter alia*, that the Defendants would be released from liability in the pending lawsuits and thereafter.[ix] To this end, under the terms of the MSA, the settling states agreed to file consent decrees with the appropriate state courts in which the underlying lawsuits had been filed in order to settle those suits.[x]

As a result, on December 11, 1998, the Commonwealth and the Defendants filed a joint motion in the trial court requesting approval of the settlement and the consent decrees. Before and after this joint motion was filed, a number of parties filed motions to intervene in the action. These parties included private anti-tobacco activists and organizations, not-for-profit hospitals, and the County of Allegheny (intervenors).

On January 13, 1999, the trial court issued four orders that are the basis of the instant appeals. On that date, the trial court issued orders: approving and entering the proposed agreed order of dismissal with prejudice submitted by the Commonwealth and the Defendants; approving and entering the consent decrees under the terms outlined in section XIII of the MSA and the STMSA; and denying the intervenors' petitions to intervene. The instant appeals were filed from these orders, and the appeals were consolidated and set for expedited review by this Court's order dated March 3, 1999.

However, on May 17, 1999 the County of Allegheny filed a praecipe to discontinue its appeals. This praecipe to discontinue is the basis of the above order of this Court discontinuing and ending the appeals with prejudice. I respectfully dissent with respect to the majority's order discontinuing the above-captioned appeals for two reasons.

The first basis for my dissent is my belief that the pleading filed in this court requesting discontinuance of the appeals does not comport with the relevant rules governing these types of pleadings, and does not demonstrate the good cause required for discontinuance. Pa.R.A.P. 1973(a) states, in pertinent part, that "[a]n appellant may discontinue an appeal or other matter as to all appellees as of course at any time prior to argument, ***or thereafter by leave of court upon application...***" (emphasis added). Thus, Rule 1973 only allows an appellant to discontinue an appeal after argument by leave of court upon application. Marino v. Marino, 601 A.2d 1240 (Pa. Super. 1992); Lowrey v. East Pikeland Township, 599 A.2d 271 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 530 Pa. 635, 606 A.2d 904 (1992). The application to discontinue must comply with the provisions of Pa.R.A.P. 123(a), stating with particularity the grounds on which it is based, and the grounds for the relief demanded by the application. Id. Failure to conform to the requirements for relief enunciated in Pa.R.A.P. 123(a) will result in the denial of the application. Id.

Based on the foregoing, it is clear that the praecipe to discontinue that was filed in this case was properly treated as an application to discontinue under Rule 1973(a). However, it is also clear that the instant application to discontinue does not comport with the requirements of Pa.R.A.P. No. 123(a) as required by Lowrey.

In addition, I believe that the instant application to discontinue should only be granted upon a showing of good cause for discontinuance. As the Superior Court has previously stated:

> We must first address a procedural irregularity which arose at oral argument on this matter. Upon the conclusion of oral argument, [the Appellant] moved to withdraw this appeal.... [The Appellant's] motion to withdraw has come too late and we decline to withdraw the case from appeal. [The Appellant] has allowed this case to

> proceed through extensive briefing, application of the machinery of this court and, finally, oral argument. It was only after oral argument that counsel presented this motion. We will not allow a litigant to avail himself of the full process of the court, and then permit that litigant to remove the case from the court's jurisdiction at the very last possible moment. Thus, we deny [the Appellant's motion] and will consider the appeal on the merits.

Marino, 601 A.2d at 1243. See also, In re Fellman, 604 A.2d 263, 267-268, n. 3 (Pa. Super. .1992) ("After this opinion had been prepared, the parties advised the Court that terms of settlement had been agreed upon and requested leave to discontinue the appeal. Because of the lateness of the request, see: [Marino] and because of the significant policy issue involved ... we declined to grant permission to discontinue the appeal.")

In this case, the application to discontinue does not demonstrate ***any*** cause, much less ***good*** cause, for discontinuing the instant. appeals. In addition, because of the enormity of the settlement in this case[xi], and the profound impact it will have on the substantive rights of the Commonwealth and its various constituents[xii] and, ultimately, the citizens of this Commonwealth, these factors dictate that this Court give this matter our full attention and consideration. Based on all of the foregoing, I believe that the instant application to discontinue should be denied. Fellman; Marino; Lowrey.

The second basis for my dissent is my belief that the trial court erred in approving and entering the proposed agreed order of dismissal with prejudice submitted by the Commonwealth and the Defendants, and in approving and entering the consent, decrees under the terms outlined in section XIII of the MSA and the STMSA.[xiii] As a result, I would reverse its order dismissing with prejudice the complaint filed by Attorney General Fisher on behalf of the

Commonwealth of Pennsylvania, and its orders accepting and adopting the consent decrees.

It is true that there is a strong judicial policy in favor of parties voluntarily settling lawsuits. Rothman v. Fillette, 503 Pa. 259, 469 A.2d 543 (1983); Schlosser v. Weiler, 377 Pa. 582, 105 A.2d 331 (1954); Health Care and Retirement Corp. v. Department of Public Welfare, 632 A.2d 964 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 616, 645 A.2d 1319 (1994).

In addition, settlement agreements have many of the attributes of contracts voluntarily undertaken, and must be construed according to traditional principles of contract construction. Avery v. Pennsylvania Labor Relations Board, 509 A.2d 888 (Pa. Cmwlth. 1986).

Therefore, for a settlement to be enforceable, like any other agreement, it must possess all of the elements of a valid contract, and it may be attacked for want of authority or consideration, or on the usual equitable grounds warranting that it be set aside. Sale v. Ambler, 335 Pa. 165, 6 A.2d 519 (1939); Smith v. Brink, 561 A.2d 1253 (Pa. Super. 1989); Baumgartner v. Whinney, 39 A.2d 738 (Pa. Super. 1944).

Likewise, a "consent decree" is an agreement between the parties to an equity action and is, in essence, a contract which is as binding as if a final decree had been rendered after a full hearing on the merits. Weeast v. Borough of Wind Gap, 621 A.2d 1074 (Pa. Cmwlth. 1993). As was noted by the United States Supreme Court:

> To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. More accurately, then, as we have previously recognized, consent decrees "have the attributes both of contracts and of judicial decrees"...

Local Number 93 v. City of Cleveland, 478 U.S. 501, 519 (1986) (citation omitted). Thus, in a stipulated judgment, or consent decree, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment. California State Automobile Association Inter-Insurance Bureau v. Superior Court, 50 Cal.3d 658, 268 Cal. Rptr. 284, 788 P.2d 1156 (1990).

In addition, due to its contractual nature, a consent decree is not treated as a legal determination by the court of the matters in dispute. Jones Memorial Baptist Church v. Brackeen, 416 Pa. 599, 207 A.2d 861 (1965); Universal Builders Supply, Inc. v. Shaler Highlands Corp., 405 Pa. 259, 175 A.2d 58 (1961); Penn Township v. Watts, 618 A.2d 1244 (Pa. Cmwlth. 1992); Armstead v. Dandridge, 390 A.2d 1305 (Pa. Super. 1982).

Rather, a consent decree is considered to be a contract that binds the parties to its terms. Jones Memorial Baptist Church; Universal Builders Supply, Inc.; Like a contract, even though a court may construe or interpret the provisions of a consent decree, a court may not modify its terms absent fraud, accident or mutual mistake. Jones Memorial Baptist Church; Universal Builders Supply, Inc.; Penn Township.[xiv] Thus, it is not for the court to pass on the workability or wisdom of the agreement underlying a consent decree. Sacred Heart Hospital of Allentown v. Lanshe, 445 Pa. 57, 282 A.2d 331 (1971).

However, the contractual nature of a consent decree does not affect the judicial character of a court's acceptance of the decree or its imposition of judgment thereon. Indeed, "[i]t is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act'." Pope v. United States, 323 U.S. 1, 12 (1944) (citations omitted). Thus, as the California Supreme Court has noted:

> [A] stipulated judgment is indeed a judgment; entry thereof is a judicial act that a court has discretion to perform. Although a court may not

> add to or make a new stipulation without mutual consent of the parties, it may reject a stipulation that is contrary to public policy, or one that incorporates an erroneous rule of law. "While it is entirely proper for the court to accept stipulations of counsel that appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter."

California State Automobile Association Inter-Insurance Bureau, 50 Cal.3d at 664, 268 Cal. Rptr. at 287, 788 P.2d at 1159 (citations omitted).[xv]

Based on the foregoing, I strongly believe that it was incumbent upon the trial court in this case to make an independent examination of the proposed settlement and consent decrees, and to refuse to accept either unless it determined, among other considerations outlined below, that the "[j]udgment to be entered is a just one..." Id. Because I believe that the trial court misapprehended the nature of its review of the proposed settlement and consent decrees in this case, I am convinced that it erred in accepting the settlement and decrees and its orders should be reversed.

As the trial court noted in the opinion filed in support of its orders:

> The parties emphasize that they are not required by [Rule 229 of the Pennsylvania) Rules of Civil Procedure[xvi] to seek court approval and the entry of a consent decree in this case. However, the MSA requires certain uniform procedures in each settling state that will be facilitated by the entry of consent decrees creating "continuing jurisdiction in this Court to adjudicate any interpretation issues of enforcement that may arise as they apply to Pennsylvania."

Trial Opinion, p. 10 (footnotes omitted).

As this Court has previously noted, it is true that:

> [t]he Pennsylvania Rules of Civil Procedure ... do not provide general investigating power or require court approval for settlement agreements. See Pa.R.C.P. No. 229 (parties may settle and discontinue cases). [However, u]nder Pa.R.C.P. Nos. 2039(a)[xvii], 2206(a)[xviii], 2064[xix], and [1714(a)[xx], the power of the parties to settle and discontinue cases is subject to court approval where the matter concerns a minor, an incompetent, or a class action.

Department of Public Welfare v. Maplewood Manor Convalescent Center, Inc., 650 A.2d 1117, 1119 (Pa. Cmwlth. 1994).

The purpose of Rule 1714 requiring court approval of a compromise, settlement, or discontinuance in a class action is to protect putative members of the class from prejudicial and binding action by the representative party. Silver Spring Township v. Pennsy Supply, Inc., 613 A.2d 108 (Pa. Cmwlth. 1992). Prior to approving a settlement in such a case, the trial court must conclude that it is fair and reasonable and adequately protects the members of the class. Fischer v. Madway, 485 A.2d 809 (Pa. Super. 1984); Buchanan v. Century Federal Savings and Loan Association, 393 A.2d 704 (Pa. Super. 1978). Although there is no formula for making such a determination, a court should consider: (1) the risks of establishing liability and damages; (2) the range of reasonableness of the settlement in light of the best possible recovery; (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation; (4) the complexity, expense and likely duration of the litigation; (5) the stage of the proceedings and the amount of discovery completed; (6) the recommendations of competent counsel; and (7) the reaction of the class to the settlement. Fischer; Buchanan. In effect, prior to approving a settlement, the court should conclude that it secures an adequate

advantage for the class in return for the surrender of litigation rights. Fischer; Buchanan.

In addition, the purpose of Rule 2039 requiring court approval of a compromise, settlement, or discontinuance in an action in which a minor is a party is to protect the rights of minors in the settlement of their claims. Wilson v. Bensalem Township School District, 367 A.2d 397 (Pa. Cmwlth. 1976). This Rule was promulgated to ensure that the interests of the minor are protected above all other conflicting interests, and to protect the minor's interests in all phases of litigation. Estate of Murray v. Love, 602 A.2d 366 (Pa. Super. 1992); Klein v. Cissone, 443 A.2d 799 (Pa. Super. 1982). Thus, this Rule was specifically designed to remove from the litigants and their counsel the authority to subjectively determine what is right for a minor, and makes the court the final arbiter of what is in the minor's best interests. Power by Power v. Tomarchio, 701 A.2d 1371 (Pa. Super. 1997). Implicit in all of the foregoing cases, relating to the protection of the interests of minors in the settlement of cases, is the fact that the courts were acting as *parens patriae* for the minor. See, e.g., Shaw by Ingram v. Bradley, 672 A.2d 331 (Pa. Super. 1996) (The court's decision awarding attorneys' fees, while acting as *parens patriae* or financial steward for the minor child pursuant to Pa.R.Civ.P. No. 2039, will be reversed only upon a showing of an abuse of discretion or an error of law.)[xxi]

As noted above, one of the bases for the Attorney General's initiation of the instant lawsuit was "[i]n *parens patriae* on behalf of the citizens of Pennsylvania, including its children and adolescents, to protect their health and welfare... " Complaint, p. 8. As the United States Supreme Court has noted:

> The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal Prerogative." These

> powers and duties were said to be exercised by the King in his capacity as "father of the country."

Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics" and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "*parens patriae*" function of the King passed to the States. The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. Hawaii v. Standard Oil Company, 405 U.S. 251, 257 (1972) (citations and footnotes omitted).[xxii]

In fact, it has long been recognized that, under the *parens patriae* power, a state may initiate a lawsuit seeking injunctive or monetary relief where the claims are based on an alleged wrong to the general welfare of its citizenry. See, e.g., Stead v. Fortner, 255 Ill. 468, 478, 99 N.E. 680, 683-684 (1912) ("The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage, although not susceptible to measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the state is unable to enforce the law or protect its citizens from public wrongs."); State v. F.W. Fitch Co., 236 Iowa 208, 214, 17 N.W.2d 380, 383 (1945) ("It is a general rule that, independently of any statutory provision, a state may institute a suit in any of its own courts, whether required by its pecuniary interests or the general public welfare."); State v. Ri-Mel, Inc., 417 N.W.2d 1012, 112 (Minn. Ct. App. 1987) ("[C]ommon law has recognized that under the doctrine of *patens patriae* a state may maintain a legal action on behalf of its citizens, where state citizens have been

harmed and the state maintains a quasi-sovereign interest."); State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 126 (Mo. Ct. App. 1984) ("The right of a state, either as the sovereign or as a political corporation, to sue in any of its courts exists independent of statute... To enforce a right or redress a wrong as a political corporation, the state may have avail of any remedy open to a private suitor - as for instance a tort action for damage to its property."); State v. Chicago & N.W. Ry. Co., 147 Neb. 970, 977, 25 N.W.2d 824, 828 (1947) ("It is a general rule that every government entrusted with powers and duties involving the Public welfare has a right to apply to its own courts for any proper assistance in the exercise of one and discharge of another."); People v. Gary M., 138 Misc.2d 1081, 1092, 526 N.Y.S.2d 986, 995 (1988) ("[T]he doctrine of *parens patriae* imposes an obligation on the part of the State to protect the rights of its citizens."); State v. Hooker, 87 N.W.2d 337, 340 (N.D. 1957) ("It has been repeatedly held that the state has the right, independent of any statutory provision, to institute a suit in any of its courts when it is required for the general welfare of its people."); State v. City of Bowling Green, 38 Ohio St. 2d 281, 283, 313 N.E.2d 409, 411 (1974) ("[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property.")[xxiii]

Based on the foregoing, it is clear that the Commonwealth properly initiated the instant lawsuit pursuant to the doctrine of *parens patriae*[xxiv] as the complaint alleged, *inter alia*, that:

> [i]t was filed on behalf of the citizens [of] Pennsylvania, including its children and adolescents, to protect their health and welfare, and to recover damages which the Commonwealth and its citizens have sustained as a result

> of the unlawful and concerted action of the defendants, as well as injunctive relief.

Complaint, p. 8. In addition, relating to the settlement of the claims raised in the Attorney General's complaint, the provisions of the MSA purports to settle all past, present, and future claims that could be asserted against the Defendants by the Commonwealth and all of its "[s]ubdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions...." MSA § II(pp).

Thus, because this case was initiated, in part, as *parens patriae* for the protection of Pennsylvania's children and adolescents, and because the purported settlement extends to extinguish the potential claims that could be raised by a large class of unrepresented plaintiffs, it is my firm belief that the principles underlying Rules 1714, 2039 and 2064 of the Pennsylvania Rules of Civil procedure apply in this matter. Because the trial court's acceptance of the proposed settlement and consents decrees does not meet the mandates of these Rules, its orders accepting these decrees and entering judgment thereon should be reversed.

In the opinion filed in support of its orders in this case, the trial court stated the following, in pertinent part:

> [I]n light of th[e] principles [relating to consent decrees], this Court approved the Consent Decrees that all the parties endorsed in their joint motion to approve the settlements and consent decree. This complicated settlement was reached after months of vigorous arm's-length negotiations. It spares all parties incalculable expense and the uncertainties inherent in such complex litigation. The claims asserted by the Commonwealth's ten count complaint brought in its capacity as sovereign, and as *parens patriae* on behalf of all of its citizens, were often novel and subtle. Resolution of such fundamental questions as

whether subrogation is the exclusive statutory remedy for recouping the state's Medicaid expenditures was far from clear-cut as evidenced by conflicting precedent from other states. While other state courts in approving the MSA have noted the risks the Attorneys General faced with their cases, the tobacco defendants faced the formidable task of defending in 46 state actions raising complex issues that had to be fought out in a maze of varying state statutes and precedent.

Not only does the settlement spare the parties the expense and risks of continuing litigation, it accords with the strong judicial policy in Pennsylvania favoring voluntary settlements. For one thing, settlements assure more expeditious compensation for those who are injured since they avoid the inevitable delays of the appellate process. In addition, settlements help reduce overcrowded courts, thereby shortening a litigant's wait for a trial date. They also reduce the burdens and expenses in maintaining court systems. Not surprisingly, the Pennsylvania Supreme Court observed, the astute lawyer Abraham Lincoln advised: "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time."

[In conclusion, t]he attorneys general - in launching their landmark lawsuits against the tobacco industry – necessarily undertook the unpredictable financial risks borne by all litigants. The settlement agreements eliminate these risks - while affording undeniable benefits to the citizens of Pennsylvania. The MSA will thus provide billions of dollars to the Commonwealth to be

> dedicated to the public good. The voluntary restraints that the tobacco defendants have accepted on their powers of persuasion especially as directed to the youth of Pennsylvania - may also afford inestimable benefits. For these reasons, this court entered the Consent Decrees and approved the MSA and STMSA on January 13, 1999. To have done otherwise would have been a manifest abuse of discretion.

Trial Court Opinion, pp. 56-59 (citations and footnotes omitted).

It is true that, in considering whether to accept a settlement under Rule 1714, the trial court should consider, *inter alia*, the risks of establishing liability and damages, the complexity, expense and likely duration of litigation, and the recommendations of competent counsel. Fischer; Buchanan.[xxv] Likewise, in considering whether to accept a settlement under Rule 2039, the trial court should consider, *inter alia*, "[t]he concrete issues of 'causation' and 'proof...' " Klein, 443 A.2d at 799.

However, under Rule 1714, a trial court is also required to consider the range of reasonableness of the settlement in light of the best possible recovery. Fischer; Buchanan. In addition, under Rule 2039, the trial court is required to make the interests of the minor the paramount consideration over those of the parties to the litigation. Power by Power; Klein. Moreover, and more importantly, under either Rule 1714 or Rule 2039, the trial court must have before it sufficient necessary information to permit an intelligent decision prior to determining the appropriateness of a proposed settlement. Fischer; Klein.

It cannot be doubted that the amount of the settlement in this case, an initial recovery of 11.26 billion dollars over 25 years with the potential for future payments of over 500 million dollars annually thereafter, is a significant sum of money. However, the record in this case is absolutely devoid of ***any*** evidence establishing the damages suffered by the

Commonwealth through its agencies, departments, commissions or divisions, ***and*** its 67 counties, ***and*** its various municipalities, cities, boroughs, townships, entities, instrumentalities and educational institutions. Thus, from this record, there is absolutely no way to determine the adequacy or appropriateness of the proposed settlement in this case. In the absence of ***any*** evidence to support this determination, the trial court was absolutely precluded from possessing the sufficient necessary information to permit an intelligent decision prior to accepting and endorsing settlement in this case.

In conclusion, it is clear to me that a trial court may not place its judicial imprimatur on a proposed settlement and consent decrees, and order the entry of judgment thereon, where the record utterly fails to demonstrate that it is a just and fair resolution to the matter. This is particularly so where the proposed settlement and consent decrees are of such a broad expanse, so absolutely preclude future claims and liability, and may never be altered or amended in any manner by the court. To my mind, the entry of judgment based on such a speculative and conjectural predicate affecting such significant rights must surely constitute an error of law. Accordingly, I would deny the application to discontinue the instant appeals, adjudicate these matters on the merits, and reverse the orders of the trial court in this case.

NOTES:

1. Section 204(c) of the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, as amended, 71 P.S. § 732-204(c) provides, in pertinent part, that "[t]he Attorney General shall represent the Commonwealth...in any action brought by or against the Commonwealth....The Attorney General shall collect, by suit or otherwise, all debts...due the Commonwealth..."

2. Section 4 of the Unfair Trade Practices and Consumer Protection Law, Act of December 17, 1968, P.L. 1224, as amended, 73 P.S. § 201-4 provides, in pertinent part:

> Whenever the Attorney General ... has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

3. Section 8(b) of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201 - 8(b) provides, in pertinent part:

> (b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is willfully using or has willfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General .... acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1000) per violation, which civil penalty shall be in addition to other relief which may be granted under section[] 4 ... of this act...

4. " '*Parens patriae*', literally 'parent of the country' refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability. It is a concept of standing utilized to protect those quasi-sovereign interests such as [the] health, comfort and welfare of the people, interstate water rights, [the] general economy of the state, etc." BLACK'S Law DICTIONARY 1003 (5th ed. 1979) (citations omitted).

5. Section II of the MSA defines "Releasing Parties" as:

> [E]ach Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto to release past present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, ... unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in *parens patriae*, sovereign, quasi sovereign, private attorney general, *qui tam*, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity (as opposed to individual) is seeking recovery of health-care expenses (other than premium or capitation payments for the benefit of present or retired state employees) paid or reimbursed, directly or indirectly, by a Settling State.

MSA § II(pp).

In addition, section 11 of the MSA defines "Released Parties", in pertinent part, as:

> [A]ll Participating Manufacturers, their past, present and future Affiliates, and the respective divisions, officers, directors, employees, representatives, insurers, lenders, underwriters, Tobacco-Related Organizations, trade

associations, suppliers, agents, auditors, advertising agencies, public relations entities, attorneys, retailers and distributors of any Participating Manufacturer or of any such Affiliate (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing)...

MSA § II(oo).

6. See MSA § XI, Exhibits A, B, C, E.

7. See MSA Exhibit A.

8. See MSA §§ III, VI.

9. In particular, section XII of the MSA provides, in pertinent part:

(a) Release.

(1) Upon the occurrence of State-Specific Finality in a Settling State, such Settling State shall absolutely and unconditionally release and forever discharge all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have...

(3) Each Settling State (for itself and for the Releasing Parties) further covenants and agrees that it (and the Releasing Parties) shall not after the occurrence of State-Specific Finality sue or seek to establish civil liability against any Released Party based, in whole or in part, upon any of the Released Claims, and further agrees that such covenant and agreement shall be a complete defense to any such civil action or proceeding...

(b) Released Claims Against Released Parties. If a Releasing Party ... nonetheless attempts to maintain a Released Claim against a Released Party, such Released Party shall give written notice of such potential claim to the Attorney General of the applicable Settling State within 30 days of receiving notice of such potential claim (or within 30 days after the MSA Execution Date, whichever is later) (unless such potential claim is being maintained by such Settling State). The Released Party may offer the release and covenant as a complete defense. If it is determined at any point in such action that the release of such claim is unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim), the following provisions shall apply:

(1) The Released Party shall take all ordinary and reasonable measures to defend the action fully. The Released Party may settle or enter into a stipulated judgment with respect to the action at any time in its sole discretion, but in such event, the offset described ... below shall apply only if the Released Party obtains the relevant Attorney General's consent to such settlement or stipulated judgment, without consent shall not be unreasonably withheld. The Released Party shall not be entitled to the offset described ... below if such Released Party failed to take ordinary and reasonable measures to defend the action fully.

(2) The following provisions shall apply where the Released Party is an Original Participating Manufacturer (or any person or entity that is a Released Party by virtue of its relationship with an Original Participating Manufacturer)

(A) In the event of a settlement or a stipulated judgment, the settlement or stipulated amount shall give rise to a continuing offset as such amount is actually paid against the full amount of such Original Participating Manufacturer's share ... of the applicable Settling State's Allocated Payment until such time as the settlement or stipulated amount is fully credited on a dollar-for-dollar basis.

(B) Judgments (other than a default judgment) against a Released Party in such an action shall, upon payment of such judgment, give rise to an immediate and continuing offset against the full amount of such Original Participating Manufacturer's share ...of the applicable Settling State's Allocated Payment, until such time as the judgment is fully credited on a dollar-for-dollar basis...

MSA XII(a), (b).

10. Section XIII of the MSA provides, in pertinent part:

> (a) Within 10 days after-the MSA Execution Date ... each Settling State and each Participating Manufacturer that is a party in any of the lawsuits ... shall jointly move for a stay of all proceedings in such Settling State's lawsuit with respect to the Participating Manufacturers and all other Released Parties... Such stay of a Settling State's lawsuit shall be dissolved upon the earlier of the occurrence of State-Specific Finality or termination of this Agreement with respect to such Settling State...
>
> (b) Not later than December 11, 1998 ... :
>
> > (1) each Settling State that is a party to a lawsuit...and each Participating Manufacturer will:
> >
> > > (A) tender this Agreement to the Court in such Settling State for approval; and
> > >
> > > (B) tender to the Court in such Settling State for entry of a consent decree attached hereto ...; and
> >
> > (2) each Settling State shall seek entry of an order of dismissal of claims dismissing with prejudice all claims against the Participating Manufacturers and any other Released Party in such Settling State's action....Provided, however, that the Settling State is not required to seek entry of such an order in such Settling states action against such a Released Party (other than a Participating Manufacturer) unless and until such Released Party has released the Releasing Parties (and delivered to the Attorney General of such Settling State a copy of such release)...

MSA § XIII(a), (b).

11. As noted above the settlement offered by the Defendants under the MSA totals $206,000,000,000.00 to be paid over a period of twenty-five years. Pennsylvania's share of the initial recovery totals $11,260,000,000.00, with the potential for Payments of over $500,000,000.00 per year thereafter.

12. As also noted above, the provisions of the MSA purports to settle all past, present and future claims against the Defendants that could be asserted by the Commonwealth "[a]nd any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commission and divisions..." MSA § II(pp). However, and more importantly, the provisions of the MSA also purports to settle all past, present and future claims against the Defendants that could be asserted by the Commonwealth's "[s]ubdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions...." Id.

13. In its brief filed in support of the instant appeals, the County of Allegheny argues, *inter alia*, that the trial court erred in entering the consent decrees and final judgments which adopt the terms of the MSA. Therefore, it is appropriate to address the propriety of the trial court's actions in this regard in these appeals.

14. See also Chemick v. Chemick, 327 Md. 470, 610 A.2d 770 (1992) (Consent judgments or decrees are essentially agreements entered into by the parties which must be endorsed by the court; they have attributes of both contracts and judicial decrees.); Coastal Production Credit Association v. Goodson Farms, Inc., 71 N.C.App. 421, 322 S.E.2d 398 (1984) (A consent judgment is a contract between the parties entered upon the record with the

approval and sanction of the court.); Nieminen v. Pitzer, 281 Or. 53, 573 P.2d 1227 (1978) (A consent judgment is in the nature of a contract that has been approved by the court.); Trahan v. Trahan, 455 A.2d 1307 (R.I. 1983) (Although a consent judgment receives a court's imprimatur, the judgment is in essence a contract between the parties to the litigation and is to be construed as a contract using the rules of construction applicable thereto.)

15. See also Everett v. Cutler Mills, 52 R.I. 330, 160 A. 924 (1932) wherein the Rhode Island Supreme Court stated:

> A judgment is a decision of the law given by the court as the result of legal proceedings; it is not a contract between the parties. It is treated as a contract or as a quasi contract only by legal fiction for the purpose of enforcing legal remedies. The judgment in all substantial particulars must follow and conform to the verdict or the decision. An order for the entry of judgment is a judicial act, whether the entry is by consent or otherwise. It is the duty of the court to examine the record to ascertain its authority to enter a particular judgment. The stipulation is merely evidence to be considered by the court in making its decision to order the entry of judgment...

Id. at ___, 160 A. at 925 (citations omitted); State v. Huebner, 230 Ind. 461, 468, 104 N.E.2d 385, 388 (1952) ("That the judgment was rendered by consent of the parties does not detract from its dignity, or lessen its conclusiveness as an adjudication between the parties, but the consent is a waiver of error precluding a review upon appeal.")

16. Rule 229 of the Pennsylvania Rules of Civil Procedure states:

> (a) A discontinuance shall be the exclusive method of voluntary termination of an action, in

whole or in part, by the plaintiff before the commencement of trial.

(b) A written discontinuance may not be entered as to less than all defendants except upon the written consent of all parties or leave of court after notice to all parties.

(c) The court, upon petition and after notice, may strike off a discontinuance in order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense or prejudice.

Pa.R.Civ.P. No. 229.

17. Rule 2039(a) of the Pennsylvania Rules of Civil Procedure states:

> [N]o action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor.

18. Rule 2206(a) of the Pennsylvania Rules of Civil Procedure states:

> (a) No action for wrongful death in which a minor or an incapacitated person has an interest shall be discontinued nor shall the interest of a minor or an incapacitated person in any such action or in a judgment for damages recovered therein be compromised or settled until the court, upon petition of any party in interest, shall allow the discontinuance or approve the compromise as being fair and equitable.

Pa.R.Civ.P. No. 2206(a).

19. Rule 2064 of the Pennsylvania Rules of Civil Procedure states, in pertinent part:

> [N]o action to which an incapacitated person is a party shall be compromised, settled, or discon-

tinued except after approval by the court pursuant to a petition presented by any party in interest.

20. Rule 1714(a) of the Pennsylvania Rules of Civil Procedure states:

> [N]o class action shall be compromised, settled or discontinued without the approval of the court after hearing. Pa.R.Civ.P. No. 1714(a).

21. Although there is a paucity of cases interpreting the provisions of Rule 2064 requiring court approval of a compromise, settlement, or discontinuance in an action in which an incompetent is a party, it would appear that it has the same purposes as Rule 2039 as "[t]his Rule is a virtually verbatim adoption for incompetents of Rule 2039 applicable to minors." Goodrich-Amram, 2d § 2064:2 (1992).

In addition, it is worth noting that the purpose of Rule 2206 requiring court approval of a compromise, settlement, or discontinuance in a wrongful death action in which a minor or an incompetent is a party is to ensure that a minor's interest is protected. Estate of Murray. Under the rule, a court may ensure that any settlement of a wrongful death action entered into for the benefit of a minor is fair and equitable. Id.

22. See also Commonwealth v. Baldwin, 1 Watts 54 (1832) wherein the Pennsylvania Supreme Court noted:

> In a monarchy, the exemption of the sovereign from the operation of statutes in which he is not named, is founded in prerogative; and hence it is supposed that no such exemption can be claimed, for a sovereign constituted of the people in their collective capacity. It is certain, that so much of the prerogative as appertained to the king by virtue of his dignity, is excluded by the nature of our government, which possesses none of the attributes of royalty; but so much of it as belonged

> to him in the capacity of *parens patriae*, or universal trustee, enters as much into our political compact, as it does into the principles of the British constitution. Why should it not do so peculiarly, where the maxim *salus populi* is the predominant principle of a government, to whose operations and well being, the prerogative is as essential as to those of a monarchy?...

Id. at 55.

23. See also In re Debs, 158 U.S. 564 (1895), wherein the United States Supreme Court stated:

> [E]very government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it standing in court.

Id. at 584.

24. It is worth noting that the doctrine of *parens patriae* has arisen in another lawsuit filed against the Defendants in this case. Recently, a United States District Court denied the Defendants' motion to dismiss one of the three nationwide lawsuits brought by Blue Cross and Blue Shield medical providers against the Defendants for the recovery of economic damages incurred in the medical treatment of diseases caused by tobacco use. See Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated, 36 F.Supp.2d 560 (E-D. N.Y. 1999). In that case, the plaintiffs alleged violations of the federal Racketeer Influenced and

Corrupt Organizations Act (RICO) and the Clayton and Sherman Antitrust Acts. Id. at 565. The plaintiffs also alleged state law claims under various statutes and under the common law on theories of fraudulent misrepresentation, fraudulent concealment, breach of special duty, unjust enrichment, and conspiracy. Id.

In the motion to dismiss, the Defendants alleged that the RICO claims should be dismissed, *inter alia*, because the plaintiffs lacked standing to bring the civil suit. Id. at 568-569. However, the trial court rejected this assertion stating, *inter alia*:

> Recognizing a direct cause of action on the part of the [plaintiffs] is consistent with the role plaintiffs play in today's society. In the same way that a spouse or parent has an obligation to provide for the medical injuries of his spouse or child, non-profit medical providers such as the [plaintiffs] have an obligation to supply medical care to their covered populations. More and more, medical providers such as the [plaintiffs] have assumed the responsibility for ensuring that individuals have access to medical care. For the nearly 70 million people, one out of four Americans, who rely on the [plaintiffs] to provide their medical care, plaintiffs occupy a type of *parens patriae* relationship which is analogous to the parent-child relationship.

Id. at 581.

25. Indeed, "[i]n most cases, a very significant factor to be considered in determining whether a settlement is reasonable is the risk in proving liability and/or damages." Fischer, 485 A.2d at 812 citing Buchanan.

/s JAMES R. KELLEY, Judge

Appendix C
Pennsylvania Supreme Court Order

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
by D. MICHAEL FISHER in his official capacity as
Attorney General of the Commonwealth of Pennsylvania
v.
PHILLIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES,, PLC.; THE AMERICAN TOBACCO COMPANY, INC., c/o BROWN & WILLIAMSON TOBACCO CORPO-RATION; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.

No. 162 E.D. Misc. Dkt. 1999

Petition of Robert B. Sklaroff, MD

ORDER

PER CURIAM:

AND NOW, this 17th day of December, 1999, the Petition for Review is denied.

TRUE COPY FROM RECORD
ATTEST: December 20, 1999

s/ PATRICIA JOHNSON, Chief Clerk
Supreme Court of Pennsylvania, Eastern Division

Appendix D
Pennsylvania Invervenors' Brief

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT
CIVIL TRIAL DIVISION

In re: COURT OF COMMON PLEAS
Case No.: 97-2443
April Term, 1997

COMMONWEALTH OF PENNSYLVANIA:
PHILADELPHIA COUNTY,
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS PENNSYLVANIA ATTORNEY GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED; R. J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; THE AMERICAN TOBACCO COMPANY, INC. c/o BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; and HILL AND KNOWLTON, INC.,

Defendants.

PETITION FOR PERMISSION TO INTERVENE OF THE AMERICAN ASSOCIATION OF PUBLIC HEALTH PHYSICIANS; TRI-COUNTY TOBACCO-FREE COALITION, INC.; AMERICAN SOCIETY OF ADDICTIVE MEDICINE; COALITION FOR LEADERSHIP, EDUCATION AND ADVOCACY FOR RECOVERY; PEOPLES MEDICAL SOCIETY; AND FIRST AMENDED PETITION FOR PERMISSION TO INTERVENE OF THE CITIZENS FOR CONSUMER JUSTICE, COALITION FOR A TOBACCO-FREE PENNSYLVANIA, PA. CHAPTER, AMERICAN ACADEMY OF PEDIATRICS, CLEAN AIR COUNCIL, AND SMOKE FREE EDUCATIONAL SERVICES, INC. AND THE SECOND AMENDED PETITION FOR PERMISSION TO INTERVENE OF THE AMERICAN COUNCIL ON SCIENCE AND HEALTH, AND THE THIRD AMENDED PETITION FOR PERMISSION TO INTERVENE OF PENNPIRG, SMOKEFREE PENNSYLVANIA, AND THE FOURTH AMENDED PETITION FOR PERMISSION TO INTERVENE OF GODSHALL, SKLAROFF, AND BARG

Pursuant to Rules 2327 and 2328, Pa.R.C.P., the intervention petitioners listed in Attachment A to this petition (hereinafter "Intervention Petitioners") hereby petition for permission to intervene in this action. Intervention Petitioners seek to prevent a wholesale denial of due process to any and all who might bring public interest litigation against the tobacco companies in the future, whose efforts will be thwarted by the Master Settlement Agreement's attempt to stifle all such litigation. Intervention Petitioners do not seek to block the proposed settlement in this petition. They seek simply to be removed from its effects so that they are free to continue their work in pursuit of tobacco control.

Intervention Petitioners

1. The Intervention Petitioners, and their addresses, are listed in Attachment A to this petition, which is incorporated by reference herein.

2. Each Petitioner has demonstrated strong interest in taking action in furtherance of tobacco control. Specific facts regarding each Intervention Petitioner are included in Attachment B to this petition, which is incorporated by reference herein.

3. Some of the Intervention Petitioners have in the past taken actions or assisted others in taking actions against tobacco manufacturers, wholesalers, and or distributors, for acts, omissions, or other conduct, including actions for injunctive relief or to compensate the public at large for harms caused by the use of or exposure to tobacco. All petitioners rely on the potential to bring such actions in order to maintain their clout and credibility in the arena of tobacco control. Class Action Allegations; Pa.R.C.P. 1702

4. The Intervention Petitioners seek leave to intervene both individually and on behalf of a class of persons and organizations similarly situated to the intervenors with respect to the captioned action, to wit: all those who are arguably (but wrongfully) included with those whose accrued claims against the tobacco defendants would be released, and whose future claims against the tobacco defendants would be barred, by the release provisions of the Master Settlement Agreement ("MSA"), in particular, the MSA's definition of "releasing parties."

5. The class is so numerous that joinder is impracticable.

6. There is a fundamental question of law which is common to members of the class, i.e. whether the Attorney General of Pennsylvania has the authority to bind them to the release provisions of the MSA. The claims and defenses of the representative petitioner is typical of the claims and defenses of the class, in that the class is defined by their common interest in challenging the Attorney General's capacity to release and bar their claims.

7. The Intervention Petitioners will fairly and adequately protect the interests of the class, in that they are an established leading citizens in the nation's community of tobacco control activists; they have funds to support this litigation, and they have represented by competent counsel.

8. A class action provides a fair and efficient method for adjudication of the controversy.

Why Petitioners Should Be Permitted To Intervene

9. The approval of the proposed Master Settlement Agreement ("MSA") may affect legally enforceable interests of the representative petitioners and the class, in that:

(a) petitioners are organizations committed to tobacco control and which work toward that end in ways which include, either actually or potentially, public interest litigation against the tobacco defendants to enforce existing tobacco control measures or for compensation for tobacco-related injury to the citizenry of Pennsylvania as a whole;

(b) If the MSA is approved, its effect on petitioners and the class they represent will be to render them vulnerable to dismissal in any future action they might bring against the tobacco defendants in

furtherance of their common goals of tobacco control, in that:

> (i) the definition of "releasing parties" at Section II (pp) of the MSA includes, in addition to various subdivisions and political entities, "persons or entities acting in a *parens patriae*, sovereign, quasi-sovereign, private attorney general, *qui tam*, taxpayer, or any other capacity, whether or not any of them participate in this settlement,
>
> > (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries;
> >
> > (B) to the extent that any such entity (as opposed to an individual) is seeking recovery of healthcare expenses... paid or reimbursed, directly or indirectly by a Settling State."
>
> (ii) petitioners are organizations which, if they attempt to bring public interest litigation against the tobacco companies, will be arguably included in the MSA's definition of releasing parties quoted above, and which would purportedly be bound by the settlement for all past and future claims;

(c) Petitioners and the class they represent have been completely excluded from participation in the negotiations leading up to the MSA; and

(d) Petitioners and the class they represent will receive no benefit from the settlement whatsoever.

10. Even if, in future litigation brought by any petitioner or class member against the tobacco defendants in furtherance of tobacco control, the court determines that the petitioner was not properly included in the MSA definition of "releasing parties" and is therefore not bound by the MSA release, the petitioner's legally enforceable interests will be adversely affected, in that:

(a) the MSA contains a provision, called the "litigating releasing parties offset," which provides, at Section XII(b): "If a releasing party (or any person or entity enumerated in subsection II(pp), without regard to the power of the Attorney General to release claims of such person or entity) nonetheless attempts to maintain a Released Claim against a released party, such released party shall give written notice of such potential claim to the attorney general of the applicable Settling State within thirty days of receiving notice of such potential claim.... The released party may offer the release and covenant as a complete defense. If it is determined at any point in such action that the release of such claim is unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim), the following provisions shall apply:

(1) the released party shall take all ordinary and reasonable measures to defend the action fully. The released party may settle or enter into a stipulated judgment with respect to the

action at any time in its sole discretion, but in such event, the offset described in subsection (b)(2) or (b)(3) below shall apply only if the released party obtains the relevant Attorney General's consent to such settlement or stipulated judgment, which consent shall not be unreasonably withheld.... (2) ....

> A. In the event of a settlement or stipulated judgment, the settlement or stipulated judgment shall give rise to a continuing offset as such amount is actually paid against the full amount of such original participating manufacturers' share of the applicable Settling State's Allocated Payment until such time as the settled or stipulated amount is fully credited on a dollar-for-dollar basis." (emphasis supplied).

(b) Thus, if the petitioner proceeds with litigation, this "litigating releasing parties offset" will

- effectively immunize the tobacco defendants from the outcome of the litigation; and

- cause the Commonwealth of Pennsylvania to intervene in any such litigation against a tobacco defendant, to take on the tobacco defendants' defense, because:

> (i) in the event of petitioner's success, the litigating releasing parties offset provisions of Section XII(b) of the MSA would divert allocated payments from the Commonwealth to the petitioner;

(ii) the Commonwealth plaintiffs will therefore have a financial interest in tobacco defendants' prevailing against the petitioner, which interest would be directly adverse to the petitioner's interest; and

(iii) the Commonwealth plaintiffs' intervention in petitioner's litigation would be without objection from the tobacco defendants, as provided in § XII(b)2 C of the MSA; and

(c) No existing party to these or any other proceedings will adequately represent the petitioners' interests.

Relief Sought By Petitioners

11. The Petitioners seek to have all private, non-political individuals and entities deleted from the definition of Releasing Parties in II(pp) of the MSA.

WHEREFORE, The Petitioners respectfully request the Court to issue an Order granting them leave to intervene in these proceedings on behalf of themselves and the class they represent, and conditioning the Court's approval of the MSA (if the Court approves it) on the deletion of all individuals and entities who are not political subdivisions of the Commonwealth from the MSA's definition of Releasing Parties, by striking the MSA language quoted in paragraph 9(b)(i) of this complaint.

Respectfully submitted,

/s ALICE W. BALLARD, ESQUIRE
Law Office of Alice W. Ballard, P.C.
225 South 15th Street, Suite 1700
Philadelphia, PA 19102
(215) 893-9990
Dated: January 6, 1999
Counsel for Petitioners

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
CIVIL TRIAL DIVISION

COURT OF COMMON PLEAS
Case No.: 97-2443
April Term, 1997

In re: :

COMMONWEALTH OF PENNSYLVANIA
PHILADELPHIA COUNTY, BY D. MICHAEL FISHER,
IN HIS OFFICIAL CAPACITY AS
PENNSYLVANIA ATTORNEY GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED; R. J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; THE AMERICAN TOBACCO COMPANY, INC. c/o BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH- U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; and HILL AND KNOWLTON, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF ACTIVISTS' PETITION TO INTERVENE

Petitioners, a group of private (i.e., non-governmental) anti-tobacco activists, have petitioned to intervene in the above-captioned tobacco litigation, on behalf of themselves and others similarly situated. The Commonwealth of Pennsylvania, one of the plaintiffs in that litigation, has filed a Memorandum of Law in Opposition to the Petition to Intervene.

The tobacco defendants have filed a similar memo. Petitioners file this memorandum in answer to the Commonwealth's and the defendants', and in support of our Petition to Intervene. We do not take issue with the statements of fact in the parties' memoranda, but we reject the characterizations and statements of opinion. Accordingly, we will address the remainder of this memorandum to legal issues.

1. Petitioners' Position With Respect To The Settlement.

The petitioners, like many other tobacco activists, believe that the settlement should be rejected because it gives too much to the tobacco companies and too little to the public, and because it creates a business partnership of concerted interests between the tobacco industry and the states.

However, we are not questioning the terms of the settlement at this point in the litigation. As stated in our petition, "Petitioners do not seek to block the proposed settlement in this petition." Rather, "Petitioners seek to prevent a wholesale denial of due process to any and all who might bring public interest litigation against the tobacco companies in the future."

The background of our position is this: a primary goal of the tobacco companies has been to limit their exposure to class actions and other claims in the public interest. Consequently, the agreement purports to release such claims, whether they be past, present, or future. The agreement, as a consent judgment in the state courts, is binding on the states and (assertedly) on the subdivisions of state governments.

However, private organizations like the petitioners, who might be expected to press anti-tobacco claims in court, are not parties to the present litigation and consequently would not normally be bound by this kind of consent judgment. To close this gap in coverage, the states and the tobacco companies, without even a pretense of due process (no notice, no opportunity to be heard) expanded the definition of "releasing parties" in the agreement to include private activists. The agreement's settlement structure is such that including any entity as a releasing party releases the claims of that entity against the tobacco industry. This means that the expansion of the definition of "releasing parties" had the ostensible effect of shielding the tobacco companies from claims by private organizations. It also had the collateral effect of depriving private organizations of the power to litigate such claims. In other words, the apparently simple addition to a definition would release claims that the petitioners and others in their class might have against the tobacco industry now or any time over the next two decades, without consent or process of law.

How do the states purport to effectuate these slight-of-hand releases? Simply by assuming that states' Attorneys General have the power to release private claims, and signing an agreement that purports to do so. Additionally, recognizing that a release by an Attorney General without express authority and without notice might be unenforceable, the states agreed to indemnify the tobacco companies against that eventuality by permitting the companies to offset the

amounts they are required to pay on ostensibly released claims against the damages they are obligated to pay to the state under the settlement agreement. This indemnity supplements the release provisions by assuring the tobacco companies that even if the releases fail, the companies will suffer no loss. Thus did the states assume the risk of loss flowing from the assumption (which they must have known to be questionable) that Attorneys General have the power to release private claims.

Against this background, Petitioners' position in this litigation is that the release provisions of the MSA effect an unconstitutional deprivation of Petitioners' right of access to the courts, and that the indemnity provisions of the MSA, by which the citizenry indemnifies the tobacco companies even for awards of punitive damages, are directly contrary to the public policy of the State which expressly forbids insurance against such liabilities.

2. Prayer For Relief.

Our petition to intervene asks the Court to condition its approval of the settlement on the parties' agreement to delete private activists from the definition of "releasing parties." The Commonwealth's answer is to point out that the definition of "releasing parties" is non-severable, which means that any modification would give the tobacco companies the right to terminate the settlement. This is a result that the Commonwealth views as unthinkable, despite widespread dissatisfaction with the settlement terms, especially when compared to the far superior terms negotiated by the earlier-settling states of Minnesota, Florida, Texas and Mississippi, none of which purported to interfere with or dispose of public interest litigation brought by non-governmental entities.

The fact is that the states brought this misfortune on themselves by purporting to give the tobacco companies releases that the states have no power to give - which in turn, would give the states money damages and rights to participate in matters affecting the tobacco industry to which they are not entitled. If the MSA contained a non-severable provision requiring the states to suspend the protection of the First Amendment whenever the tobacco industry is under attack, the state could hardly be heard to complain when its citizens say the price of the settlement is too high. Similarly, here, the state cannot credibly argue that the petitioners should be bound by the release simply because the tobacco industry has insisted on a forfeiture of their civil rights. One obvious solution to this dilemma is for the parties to own up to the fact that their definition of releasing parties is overreaching, settle with the governmental releasing parties, and recognize that the non-governmental organizations must be allowed their proper share of rights of participation in future discussions, negotiations, and litigation in furtherance of tobacco control.

3. The Ripeness Doctrine.

The Commonwealth and the tobacco defendants both argue that our petition does not present an actual case or controversy, because we "fail to specify any past or current legal action instituted by petitioners themselves, or even any other legal action which would be improperly effected [sic] by the MSA." In that passage from the Commonwealth's memorandum, it characterizes our case as hypothetical. But this overlooks the actual, present injury that the Petitioners will suffer when the settlement becomes effective. At that moment, the Petitioners and all the members of their class will lose most of their power to bring public interest lawsuits against the tobacco industry. This will effectively disarm the petitioners, as explained in the next paragraph.

As matters stand today, when one of the petitioners is negotiating for a constraint, be it legislative or contractual, on any aspect of the tobacco industry, the other parties to the negotiations are well aware that in the long run, the petitioner has the power to sue, a power that gives the petitioners clout to offset their relative economic weakness.

The situation resembles a dispute in a Hollywood Western, where all the disputants are packing guns. If one of the disputants is disarmed, he loses his clout and becomes a paper tiger. Similarly in our case, if the decree deprives the petitioners of their power to litigate (of if it renders the indemnified tobacco companies untouchable), it will convert them into paper tigers lacking clout in negotiations, lacking appeal to private funding agencies and philanthropic supporters, and being constrained to resort to urging the (heavily compromised) state to make any threat of coercive action. It is not too much to say that classifying the petitioners as "releasing parties" may well put them out of business—a result the Commonwealth probably did not expect, let alone desire, when it expropriated our claims to deliver to the tobacco defendants.

4. The Petitioners Have Legally Enforceable Interests. The Commonwealth contends that the Petitioners have no more interest in this matter than the general public. This may be true in the sense that if releases created by the definition of "releasing parties" and the indemnification of the offset provisions, are effective against the Petitioners, they must necessarily be effective against the general public. The difference is that the Petitioners have an expertise, and a background of study, knowledge and experience, that the general public does not have. The Petitioners' expertise is, in fact, a public asset that should be preserved.

5. The Role Of The Attorney General.

The Commonwealth argues that intervention is unnecessary because the Petitioners' interests are already protected by the Attorney General and by the "tremendous" benefits of the settlement. This is not the place to argue the merits of the settlement. The issues here are the injury the settlement will do to the Petitioners, and the deprivation, without due process of law, of Petitioners right to litigate claims against the tobacco companies. On these issues, the Attorney General is not protecting the interests of the Petitioners; he is protecting a settlement, in the drafting of which he personally played a leading role. Our interests are undermined rather than protected by the MSA, which either takes our future claims from us completely, or indemnifies the tobacco companies against them; the MSA then exacerbates the injury by excluding us, and the public, from the category of MSA "intended beneficiaries" who might otherwise seek to enforce its mandatory provisions.

6. This is Petitioners' Only Chance to Challenge the Litigating Releasing Parties Offset Provisions of the MSA.

Defendants propose that Petitioners' concerns may better be addressed on a case-by-case basis in the future as such situations arise. That approach might work if Petitioners' only concerns were the MSA's definition of "releasing parties" and whether the Attorney General has the power to release private parties' claims against the tobacco industry.

But the case-by-case approach would effectively preclude the Petitioners from questioning the states' indemnification of the tobacco companies. In future litigation, should the Petitioners succeed in getting past the Attorney General's release of their claims, Petitioners would be hard pressed to challenge the State's agreement to indemnify the tobacco defendants against any verdict the Petitioners might obtain,

given that the agreement was negotiated by the state, presumably at arm's length, and approved by this Court. Our best, and perhaps only opportunity to challenge the indemnity, its inevitable harm to tobacco control activism, and its derogation of public policy, is here and now, before the MSA is finalized.

7. Petitioners' Petition Was Filed Promptly After They Learned That The Attorney General's Assurances Were Unreliable.

Petitioners Barg, Coalition for a Tobacco Free Pennsylvania, Smoke Free Pennsylvania, Godshall, and Sklaroff have been actively involved in this lawsuit since before it was filed in April 1997. See Barg, Godshall, and Sklaroff Affidavits, Appendix B, Tabs 1, 2, and 3. Petitioners' primary goal was to make sure that the ultimate agreement would not compromise or eliminate the rights of private parties to pursue public interest litigation in furtherance of tobacco control. Ibid.

Until November of 1998, just before the MSA made the transition from secret to public, the Attorney General assured Petitioners that they had nothing to worry about, and that their goal would be achieved. It was only upon the publication of the previously guarded MSA provisions, when Petitioners learned that their interests had been sacrificed in favor of the tobacco defendants' desire for immunity. At that point, the petitioners knew they were harmed, and they acted promptly. 8.

Conclusion.

For the foregoing reasons, Petitioners' requested relief should be granted.

Respectfully submitted,

s/ ALICE W. BALLARD, ESQUIRE
Law Office of Alice W. Ballard, P.C.
225 South 15th Street, Suite 1700
Philadelphia, PA 19102
(215) 893-9990
Dated: January 6, 1999
Counsel for Intervenors

ATTACHMENT A

LIST OF INTERVENTION PETITIONERS

Robert B. Sklaroff, M.D.
50 E. Township Line Road, Suite 130
Elkins Park, PA 19027-2253
(original petition filed on 11/18/98)

William T. Godshall
SmokeFree Pennsylvania
P.O. Box 81570
Pittsburgh, PA 15217-0370
(original petition filed on 11/18/98)

Jeffrey Barg
230 Windsor Avenue
Narberth, PA 19072
(original petition filed on 11/18/98)

PennPIRG
by: David Masur
1334 Walnut Street
Philadelphia, PA 19107
(original petition filed on 12/2/98)

SmokeFree Pennsylvania
by: William T. Godshall
P.O. Box 81570
Pittsburgh, PA 15217-0370
(original petition filed on 12/2/98)

American Council on Science and Health
by: Dr. Elizabeth M. Whelan, President
1995 Broadway, 2nd Floor
New York, New York 10023-5860
(original petition filed on 12/8/98)

Citizens for Consumer Justice
by: Lauren Townsend, Executive Director
P.O. Box 28854
Philadelphia, PA 19151
(original petition filed on 12/11/98)

Coalition for a Tobacco Free Pennsylvania
by: Jeffrey Barg, President
230 Windsor Avenue
Narberth, PA 19072
(original petition filed on 12/11/98)

Smoke Free Educational Services, Inc.,
by: Joseph W. Cherner, President
P.O. Box 3316
New York, New York 10008
(original petition filed on 12/11/98)

PA Chapter, American Academy of Pediatrics
by: Jerold Aronson, M.D., Executive Board Member
Rosemont Business Campus
Building 2, Suite 307
919 Conestoga Road
Rosemont, PA 19010
(original petition filed on 12/11/98)

Clean Air Council
by: Joseph O. Minott, Director
135 South 19th Street, Suite 300
Philadelphia, PA 19103
(original petition filed on 12/11/98)

American Association of Public Health Physicians
by: Joel L. Nitzkin, M.D., M.P.H., D.P.A. JLN, MD Associates, L.L.C.
4939 Chestnut Street
New Orleans, LA 70115-2941
(New Intervention Petitioner)

Tri-County Tobacco-Free Coalition, Inc.
by: Betsy Reibling
Governor's Plaza South
2001 N. Front Street, Building 3, Suite 334
Harrisburg, PA 17102
(New Intervention Petitioner)

American Society of Addictive Medicine
by: John Slade, M.D.
78 New Street, Third Floor
New Brunswick, NJ 08901
(New Intervention Petitioner)

Coalition for Leadership, Education and Advocacy for Recovery by: Karen A. Plaven
100 Ross Street
Pittsburgh, PA 15219
(New Intervention Petitioner)

Peoples Medical Society
by: Charles B. Inlander, President
462 Walnut Street, Lower Level
Allentown, PA 18102
(New Intervention Petitioner)

APPENDIX A TO INTERVENTION PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR PETITION TO INTERVENE

This Appendix contains descriptions of cases that have been brought in Pennsylvania and elsewhere which, if brought after approval of the MSA, would risk dismissal under the MSA release provisions (or under the MSA "intended beneficiary" provisions), or which would, if successful, recover not from the tobacco defendants, but from Pennsylvania's allocated funds, under the "litigating releasing parties offset" provisions of the MSA.

1. Mangini v. R. J. Reynolds Tobacco Company, et al., 875 P 2d 73 (Cal. 1994). This case was brought by a public interest plaintiff in California to enjoin the use of Joe Camel in tobacco advertising because of its effect on children. The plaintiff was successful, settling for punitive damages of $10,000,000.00 (ten million dollars) in addition to the injunctive provisions it sought. See tab 1.

2. Allegheny General Hospital, et al. v. Philip Morris, Inc., et al., Court of Common Pleas of Allegheny County, Civil Division GD No. 98-18956. This Complaint is brought on behalf of charitable, not-for-profit hospitals in Pennsylvania. It seeks to recover the unreimbursed costs of health care services to Medicaid and medically indigent patients, in connection with tobacco-related illnesses. (The hospitals have also petitioned in this action for permission to intervene, seeking declaratory relief). See tab 2.

3. Sweeney, et al. v. American Tobacco Company, et al. Court of Common Pleas for Allegheny County, No. GD 98-16226. This is a pending class action which seeks injunctive relief in the form of smoking cessation programs which would be available to the general public. It was brought on

behalf of a class of individuals who became addicted to nicotine as children. See tab 3.

4. Karen McNamara, et al. v. Philip Morris Companies, Inc., Court of Common Pleas for Montgomery County No. 98-13503; removed to U.S. District Court for the Eastern the District of Pennsylvania. This class action was filed in July of 1998, seeking economic damages (for a class of Pennsylvania residents who purchased Marlboro Lights cigarettes) and declaratory and injunctive relief that would benefit the general public. The suit alleges that Philip Morris falsely claimed that Marlboro Lights contained lowered tar and nicotine in comparison to regular cigarettes, that it failed to disclose the existence and proper use of ventilation holes, and that it intentionally manipulated the tobacco used in Marlboro Lights to boost or increase its addictive propensities. The suit does not seek recovery for personal injuries attributable to the use of Marlboro Lights. See tab 4.

5. Reverend Jessie Brown, et al. v. Philip Morris, Inc., et al., U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 98-5518 (currently pending before Judge Padova). This is a race discrimination case brought under the Civil Rights Act of 1866, 42 U.S.C. 1981 and 1982, and other statutes, challenging the tobacco companies' discriminatory marketing of menthol cigarettes to black Americans for the purpose of intentionally promoting a product that the defendants know is defective, hazardous, and dangerous, on the basis of race. The suit also charges that the tobacco manufacturers conspired with their trade associations, and with their public relations and lobbying agents, to conceal from and to mislead and deceive black Americans regarding the evidence that use of their menthol tobacco products can cause serious and fatal diseases. See tab 5.

APPENDIX B TO INTERVENTION PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR PETITION TO INTERVENE

AFFIDAVITS OF PETITIONERS

Jeffrey Barg Tab 1

William Godshall Tab 2

Robert Sklaroff, M.D. Tab 3

Joseph Otis Minott Tab 4

Ron Masur Tab 5

ATTACHMENT B

TOBACCO CONTROL ACTIVITIES OF EACH INTERVENOR

1. Individual Petitioners Sklaroff, Godshall, and Barg are citizens of the Commonwealth of Pennsylvania, each having demonstrated strong interest in pursuing legal and other remedies in furtherance of the goal of tobacco control, those pursuits including:

(a) Dr. Sklaroff has been an advocate for tobacco control during the past two decades. He presently serves as a consultant to the plaintiffs in recently-filed class action litigation claiming inter alia that tobacco companies violated federal civil rights law through the promotion of menthol-containing cigarettes.

(b) Mr. Godshall has been an advocate for tobacco control during the past decade. He is the executive

director of petitioner SmokeFree Pennsylvania, and he presently serves as co-chair of the major national coalition promoting tobacco control (Save Lives, Not Tobacco: A Coalition for Accountability).

(c) Mr. Barg has been an advocate for tobacco control during the past decade. He presently serves as President of the Coalition for a Tobacco-Free Pennsylvania, and the Chair of the Tobacco-Free Education and Action Coalition for Health.

2. Petitioner SmokeFree Pennsylvania is a non-profit health research, education and action organization dedicated to protecting people from toxic tobacco smoke pollution, reducing illegal tobacco sales to minors, and creating policy incentives for nicotine addiction recovery.

3. Petitioner PennPIRG is a non-profit, non-partisan research and advocacy organization working in Pennsylvania on behalf of consumers and the environment.

4. Petitioner American Council on Science and Health ("ACSH") is a non-profit public health consumer advocacy group which is now celebrating its 20th anniversary. ACSH's ongoing tobacco related projects include:

(a) an evaluation of the health effects of environmental tobacco smoke;

(b) reporting on "Alcohol vs. tobacco: comparing and contrasting health effects and regulatory activity;" and

(c) researching how well women's magazines report on tobacco and health.

5. Petitioner Citizens for Consumer Justice is a Pennsylvania statewide consumer organization working on health and safety issues inside and outside the justice system. Citizens for Consumer Justice has demonstrated strong interest in taking action in furtherance of the public interest on health matters, including:

(a) filing amicus briefs in health-related litigation; and

(b) convening the Patients, Not Profits Coalition, which acted as the consumer/public interest voice in connection with the Allegheny Health System crisis in the Delaware Valley.

6. Petitioner Coalition for a Tobacco Free Pennsylvania ("The Tobacco Coalition") is a non-profit health research, education and advocacy organization composed of 26 organizational members dedicated to the promotion of a tobacco-free lifestyle among adults and youth in Pennsylvania.

7. The Tobacco Coalition has demonstrated a strong interest in taking action in furtherance of tobacco control, including spearheading advocacy on preventing underage tobacco sales, raising tobacco taxes, discouraging investment in tobacco stocks, and ensuring a just resolution of Pennsylvania's lawsuit against the tobacco companies.

8. Petitioner PA Chapter, American Academy of Pediatrics ("Academy of Pediatrics") is a membership organization of pediatricians dedicated to providing advocacy for children on public health issues. The Academy of Pediatrics has demonstrated a strong interest in taking actions in furtherance of tobacco control, including the development and implementation of a smoking cessation program.

9. Petitioner the Clean Air Council is a tax exempt, non-profit membership corporation organized under the laws of Pennsylvania with offices at 135 South 19th Street, Suite 300, Philadelphia, PA 19103. The Council works to protect everyone's right to breathe clean air. The Clean Air Council has demonstrated a strong interest in taking action in furtherance of the public interest on matters concerning air quality, including litigation to shut down the City of Philadelphia's trash incineration facility in Roxborough, Pennsylvania, and litigation to enforce various laws and orders designed to improve the quality of the air we breathe. The Council has worked on smoking as part of its indoor air pollution program since 1983, and it is a member of the petitioner coalition for a tobacco-free Pennsylvania.

10. Petitioner SmokeFree Educational Services, Inc. ("SES") is an organization with over 100,000 advocates whose mission is to win the right to live and work in a smokefree environment, and to educate young people about the disadvantages of tobacco addiction.

11. Petitioner Tri-County Tobacco-Free Coalition, Inc. was formed by a group of concerned agencies and individuals in response to the alarming increase in the use of tobacco products by the youth of Dauphin, Cumberland, and Perry counties. The mission of the Tri-County Tobacco-Free Coalition, Inc. is to set in motion a variety of mechanisms to reverse the trend of increasing tobacco product usage among the youth in the Tri-County area.

12. Petitioner The American Association of Public Health Physicians is a membership organization which advocates on behalf of public health physicians for public health and preventative services.

Appendix E
Sklaroff v. Philip Morris, Inc
Complaint and Preliminary Objections (Excerpts)

Robert B. Sklaroff, MD
Suite 130
50 East Township Line Road
Elkins Park, PA 19027-2253
(215) 663-8200

Robert B. Sklaroff, MD *pro se*	Court of Common Pleas Philadelphia County
v.	Civil Action – Equity
Philip Morris Incorporated	
	MAY TERM, 1999 No. 2101

COMPLAINT OF PLAINTIFF, ROBERT B. SKLAROFF, MD

c/o Mary A. McLaughlin, Esquire
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Robert B. Sklaroff, MD, today files this Civil Complaint because a member of the Tobacco Industry ["TI"] flagrantly violated the Master Settlement Agreement ["MSA"] with the Attorney General ["AG"] of the Commonwealth of Pennsylvania {"CoP"] and because the AG knowingly failed to prosecute the tobacco manufacturer that effected this abrogation of this nationwide pact. Specifically, Philip Morris Incorporated ["PM"] initiated a "Manufacturer Sponsored Promotion" with Wawa Food Markets ["Wawa"] that led to the posting of forty (40) large outdoor billboards in the CoP that advertised the availability of its product, Marlboro, at a discount ($2.19/pack). The proprietary cigarette logo was employed thereupon, behavior that constituted unambiguously prohibited activity by PM under the dictates of the MSA. Following communication with the AG regarding this problem, Wawa "voluntarily" agreed to remove the billboards forthwith; because the AG failed to seek appropriate damages from PM for this action, however, Dr. Sklaroff has filed public interest lawsuit, reflecting his legally enforceable interest—inasmuch as there otherwise will be no way to achieve appropriate relief from PM—and states in support thereof:

Parties

1. Robert B. Sklaroff, MD, is a physician-activist and taxpayer.

2. Dr. Sklaroff has a legally enforceable interest and standing as a taxpayer and as a private Attorney General to initiate this action according to the Biester guidelines [487 Pa. at 443, 409 A.2d at 851 (1979)] and because he has a direct, substantial and immediate interest in the necessity for PM to comply with the MSA.

3. Defendant Philip Morris, Inc. ["PM"] is a Virginia corporation authorized to do business in the CoP and which actually does business in the CoP, and has its principal place of business at 120 Park Avenue, New York, New York 10017. PM manufactures, distributes, advertises and sells various tobacco

products—including those under the brand name "Marlboro"—throughout the United States and throughout the CoP.

4. D. Michael Fisher, Esquire, is the AG of the CoP.

Procedural History

5. The existence of the MSA was announced nationally on November 16, 1998; it was approved in the CoP on January 13, 1999 by Judge John W. Herron of the Philadelphia Court of Common Pleas.

6. Its current status is under review by Commonwealth Court.

The Master Settlement Agreement

7. The MSA mandated "Elimination of Outdoor Advertising" [III (d)]:

> (1) Removal. Except as otherwise provided in this section, each Participating Manufacturer shall remove form within the Settling states within 150 days after the MSA Execution Date all of its (A) billboards (to the extent that such billboards constitute Outdoor Advertising) advertising Tobacco Products. . . .

8. The MSA defined "Outdoor Advertising" [II (ii)]:

> (1) billboards,
> (2) signs and placards in arenas, stadiums, shopping malls and video game arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard located in an Adult-Only Facility), and
> (3) any other advertisements placed
> (A) outdoors, or
> (B) on the inside surface of a window facing outward.
>
> Provided, however, that the term "Outdoor Advertising" does not mean

(1) an advertisement on the outside of a Tobacco Product manufacturing facility;

(2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed

(A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine),

(B) outside (but on the property of) any such establishment, or

(C) on the inside surface of a window facing outward in any such establishment;

(3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or

(4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

9. The MSA has a "Limitation on Third-Party Use of Brand Names" [III (i)]:

After the MSA Execution Date, no Participating Manufacturer may license or otherwise expressly authorize any third party to use or advertise within any Settling State any Brand Name in a manner prohibited by this Agreement if done by such Participating Manufacturer itself.

Each Participating Manufacturer shall, within 10 days after the MSA Execution Date, designate a person (and provide written notice to NAAG of such designation) to whom the Attorney General of any Settling State may provide written notice of any

such third-party activity that would be prohibited by this Agreement if done by such Participating Manufacturer itself. Following such written notice, the Participating Manufacturer will promptly take commercially reasonable steps against any such non-*de minimis* third-party activity. Provided, however, that nothing in this subsection shall require any Participating Manufacturer to

(1) breach or terminate any licensing agreement or other contract in existence as of July 1, 1998 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); or

(2) retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer.

10. The MSA mandated "Enforcement" of these provisions [VII]:

(a) Jurisdiction. Each Participating Manufacturer and each Settling State acknowledge that the Court . . .

(b) (2) shall retain exclusive jurisdiction for the purposes of implementing and enforcing this Agreement and the consent Decree as to such Settling State. . . .

(c) Enforcement of Consent Decree. Except as expressly provided in the Consent Decree, any Settling State or Released Party may apply to the Court to enforce the terms of the Consent Decree (or for a declaration construing any such term) with respect to alleged violations within such Settling State. . . .

(d) Enforcement of this Agreement...(4) If an issue arises as to whether a Participating Manufacturer has failed to comply with an Enforcement Order, the Attorney General for the Settling State in question may seek an order for interpretation or for monetary, civil contempt or criminal sanctions to enforce compliance with such Enforcement Order.

Billboard Advertisements

11. Prior to May 10, 1999, forty (40) billboards were posted in the CoP by Wawa advertising the availability of a PM product (Marlboro cigarettes) for $2.19/pack.

12. These billboards indisputably met the definition of outdoor billboards in the MSA and, thus, were indisputably prohibited by the MSA.

13. The subject billboard advertisements indicated thereupon that they each was a "Manufacturer Supported Promotion"; inasmuch as PM manufactures Marlboro cigarettes, such promotional support through a third-party by this MSA-signatory was indisputably banned by the MSA.

14. On May 10, Dr. Sklaroff notified the AG that PM was in violation of the MSA because it had not taken any "reasonable commercial steps" to stop Wawa from employing its Marlboro logo on this billboard advertising [Appendix A].

15. Following receipt of Dr. Sklaroff's complaint, between May 11-12, the AG communicated with Wawa; as a result, Wawa "voluntarily" agreed to remove the billboards expeditiously, events that were well-documented in print and broadcast media reports that have been transmitted both locally and nationally [Appendix B].

16. PM has refused to apply its enforcement obligations under the MSA, as evidenced by comments on the May 17, 1999 television program "Good Morning America" made by PM Senior Vice President Ellen Merlo, who dismissed and discounted the "Third-Party" clause: "Because Wawa sells the product and that's all they're doing is advertising they have the product for sale, we do not have any legal recourse."

17. On the television program "Good Morning America aired on May 17, 1999, the AG stated: "We considered the Wawa billboards as a clear violation of the Agreement. . . . We think that means going to court, if necessary, to stop retailers from advertising their product."

18. The AG, however, failed to seek penalties against PM as a result thereof, and the AG failed to seek injunctive relief to prevent similar future violations of the MSA.

19. Dr. Sklaroff believes and therefore avers that PM has provided and continues to provide financial incentives to its distributors and retailers for advertising and other promotional purposes for use without restriction thereupon.

20. Further, Dr. Sklaroff believes and therefore avers that, as a consequence, retailers such as Wawa use such financing to pay for billboard advertising; thus, PM intentionally and knowingly finances tobacco-billboard advertising in direct violation of the MSA.

21. PM's conduct is a violation of the MSA.

22. PM's conduct is an unfair trade practice and violates the Pennsylvania Unfair Trade Practices and Consumer Protection Law in that:

a. PM is promoting advertising that is misleading as to its sponsorship and endorsement which are prohibited by the MSA.
b. PM is promoting advertising that is deceptive and confusing.
c. PM's promotion of tobacco products is an unfair trade practice, representing that tobacco has benefits and qualities that it does not have.

23. Plaintiff lacks an adequate or appropriate remedy at law to compel PM to cease and desist, and therefor is entitled to equitable and injunctive relief.

24. By reason of the aforesaid, Dr. Sklaroff and the CoP are suffering immediate and irreparable harm, entitling them to temporary, preliminary and final injunctive relief plus reasonable attorney fees and costs (pursuant to 42 PA.C.S.A. ¶ 2503).

Prayer for Relief

WHEREFORE, Dr. Sklaroff demands a trial be held in the Philadelphia Court of Common Pleas before Judge John W. Herron. Dr. Sklaroff demands judgment against PM for all damages suffered by the CoP and its citizenry by reason of its harmful activity, flagrant violation of the MSA, deceptive practices, unfair trading practices, and violations of the Consumer Protection Law. Dr. Sklaroff seeks compensatory and punitive damages; temporary, preliminary and final injunctive relief; plus reasonable attorney fees and costs.

Respectfully Submitted,

/s Robert B. Sklaroff, MD

*

CERTIFICATE OF SERVICE

I, Robert B. Sklaroff, M.D., hereby certify that on this, the 17th day of May, 1999, I caused a true and correct copy of this motion to be sent today, by First Class Mail, to Counsel at the addresses listed below:

Mary A. McLaughlin, Esquire
Dechert, Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

*

BRIEF OF PHILIP MORRIS INCORPORATED

This Document was filed on April 20, 2000 before the Superior Court, Commonwealth of Pennsylvania; Arguments raised in opposition to efforts to gain standing have been quoted in outline form, then key excerpts have been cited (with references omitted) to convey all intended content.

A. The Lower Court Properly Concluded that Sklaroff Has No Standing to Enforce the MSA

1. Sklaroff Has No Standing to Enforce the MSA as a Party or as an Intended Beneficiary

2. Sklaroff Cannot Assert Taxpayer Standing to Enforce the Terms of the MSA against Philip Morris

B. Sklaroff Does Not have Standing under the UTPCPL

C. The Lower Court Properly Dismissed Sklaroff's Complaint as Moot

D. There Are Additional Reasons, Not Addressed by the Court of Common Pleas, Why Sklaroff's Complaint Was Subject to Dismissal

1. Sklaroff Cannot Maintain an Action for Damages under the UTPCPL on Behalf of the Citizens of Pennsylvania

2. Sklaroff Does Not Have Standing to Seek Injunctive Relief under the UTPCPL

3. Sklaroff's Allegations of Fraud Are Insufficient to State a Claim under the UTPCPL

*

A. The Lower Court Properly Concluded that Sklaroff Has No Standing to Enforce the MSA

1. Sklaroff Has No Standing to Enforce the MSA as a Party or as an Intended Beneficiary

As the lower court noted, "a settlement agreement may only be enforced by parties thereto and not by third parties." However, "[n]owhere in his complaint does [Sklaroff] allege that he was a signatory or party to the MSA." Nor could he: the MSA's enforcement provision permits only the participating tobacco manufacturers and the Settling States, including Pennsylvania, to implement and seek enforcement of the agreement. Moreover, Sklaroff was neither a plaintiff nor a defendant in the underlying lawsuit brought by the Commonwealth against the tobacco companies, and had no right to control those proceedings.

Sklaroff also fails to allege that he has standing as a third-party beneficiary to the MSA. Under Pennsylvania law,

> A party becomes a third-party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Here, the MSA does not express an intention to benefit Sklaroff; on the contrary, it expressly limits its enforcement to the attorneys general of the Settling States, including Pennsylvania.

In fact, rather than alleging that the MSA expresses an intention to benefit him, Sklaroff has pleaded exactly the opposite: in his complaint, he quotes the pertinent provision that limits enforcement to the attorneys general.

As the lower court recognize, Pennsylvania cases involving beneficiaries to governmental contracts are particularly apposite in this case because the Commonwealth is a party to the MSA. These cases instruct that the test for third party beneficiary standing should be applied strictly here. In Drummond v. Univ. of Pa., for example, the residents of the City of Philadelphia sued to enforce a contract between the city and the University of Pennsylvania pursuant to which the university agreed to create 125 scholarships each year. In holding that the residents lacked standing, the Commonwealth Court observed that, where "a governmental contract is at issue, the test for whether a member of the public is a third-party beneficiary must be strictly applied." In accordance with this principle, the court focused on the language of the contract to determine whether it evidenced "an intent that the party contracting with the government. . .be liable to third parties in the event of non-performance." The contract with the university, much like the MSA, contained no evidence of such intent. The court therefore held that the contract did not give members of the public standing to enforce the agreement, and dismissed the plaintiffs' claims. (See also [another case that held] that prison inmates did not have standing as third-party beneficiaries to sue cable company for breach of its contract with the Commonwealth.)

I will respond to this section by noting how PM quoted selectively from my complaint in an attempt to marginalize my effort to gain standing as a "third-party beneficiary."

I will recall prior averments that state, as parens patriae, *I act on behalf of my 9-3/4 year old son, who most-definitely is a named beneficiary of both the original complaint and the subsequent MSA.*

I will also flesh-out each phrase in the indented-quotation to demonstrate how other reasons for standing apply. Although the MSA limits "enforcement" to the AG (which is obviously being challenged), this doesn't mean that "the MSA does not express an intention to benefit Sklaroff."

I will also clarify the difference between a set of quotes from the MSA and my pleadings; just because I lifted all relevant data and inserted key MSA quotations within my complaint, I did not "plead" based upon contrary quotes.

Finally, inter alia, *I will differentiate the cited cases involving a "contract" from a court-approved MSA. Thus, this distinction will evolve principally from the opinion issued by Commonwealth Court Judge Kelley.*

2. Sklaroff Cannot Assert Taxpayer Standing to Enforce the Terms of the MSA against Philip Morris.

a. Sklaroff Pleads an Interest Common to all Pennsylvania Citizens.

Generally, to challenge an action or an order, a plaintiff must be "aggrieved" by some action of the defendant. An individual does not satisfy this standard by asserting the common interest of all citizens in having the law obeyed. Rather, the plaintiff must possess a substantial, direct and immediate interest in the subject matter of the litigation.

In this case, although Sklaroff asserts "a direct, substantial and immediate interest in the necessity for PM to comply with the MSA" and an interest based on the AG's failure to seek damages from PM, his allegations are insufficient to confer standing because such interests are shared by all Pennsylvania citizens. Moreover, to the extent that Sklaroff's suit is based on the alleged inaction of the AG, Sklaroff is asserting an interest aggrieved by the AG, not by PM.

I will respond to this section by quoting many prior points with regard my many reasons for seeking standing. I will also note that I also sought an injunction (not just damages) against PM for having violated the MSA. Finally, inter alia, *I will note that the pattern of ongoing conduct threatens to create the image that PM has the capacity to violate the MSA with abandon, causing damage to national tobacco control efforts; the impact upon my son (and all children) will be obvious.*

b. Sklaroff's Allegations Do Not Meet the Requirements of the Narrow Exception Created by *Biester v. Thornburgh*.

There is, of course, a narrow exception to the general requirements for standing in certain kinds of actions involving taxpayers. Sklaroff's allegations, however, do not meet the requirements for this exception.

A taxpayer may establish standing when his interest is not substantial, direct or immediate when he is challenging certain governmental actions. To have this type of standing, however, a plaintiff must still "allege and prove an interest in the outcome of the suit which surpasses 'the cmmon interest of all citizens in procuring obedience to the law.' " . . . .A Taxpayer-plaintiff must plead and prove that: (1)—the governmental action in question would otherwise go unchallenged; (2)—those directly affected are beneficially affected; (3)—judicial relief is appropriate; (4)—redress through other channels is unavailable; and (5)—no other party is better situated to assert the claim.

Taxpayer standing is further limited to only those cases in which the plaintiff "challenges an obligation placed on the general public or an emolument given through the exercise of governmental power." As the lower court noted, the cases recognizing taxpayer standing "have necessarily involved claims against some form of governmental authority or activity."

Pennsylvania courts have not permitted taxpayer standing for private plaintiffs seeking to enforce the terms of a government contract in which the taxpayer-plaintiff is neither a party to nor a beneficiary of the agreement. The reasoning for this principle is clear:

> The interpretation and administration of a contract. . .is not an obligation placed on the general public or an emolument given to the exercise of governmental power. Governmental officials, not taxpaying members of the public, are charged with interpreting public contracts. Members of the public are merely incidental beneficiaries of a government contract and have no actionable rights thereunder.

Again, Sklaroff's problem is that he is suing the wrong party to have taxpayer standing. As the lower court noted, the AG is not a party to this suit and could not be joined here. Moreover, even if Sklaroff were to maintain an action against the AG, he would still be without standing to maintain a suit against PM to enforce the terms of the MSA. The lower court therefore properly dismissed Sklaroff's suit.

The reasons I fit the five Biester criteria are not refuted, so the key issues apparently are (again) whether I have standing distinct from the public and whether a court-approved MSA carries broader implications that does a government contract. These points will be re-emphasized.

B. Sklaroff Does Not have Standing under the UTPCPL

. . . .Sklaroff has not alleged that he purchased any goods or services from PM for personal, family or household use. Nor has he alleged that he has suffered any damages "as a result" of PM's actions. [Thus, he lacks standing.]

I will again respond that this effort is to be promulgated as a private-AG, invoking the recent California decision.

C. The Lower Court Properly Dismissed Sklaroff's Complaint as Moot

The lower court also correctly concluded that Sklaroff's complaint was moot because Wawa had agreed to remove the billboards at issue. "The mootness doctrine requires that 'an actual controversy must be extant at all states of review, not merely at the time the complaint is filed." However, an otherwise moot case may nonetheless still be resolved by the court in one of three narrow instances: (1)—when the case involves questions of great public importance; (2)—when the conduct complained of is capable of repetition yet avoiding review; or (3)—when a party to the controversy will suffer some detriment without the court's decision.

Sklaroff's complaint alleges that Wawa's billboards advertising Marlboro cigarettes violated the MSA. However, as admitted by Sklaroff in his complaint, the alleged wrongful actions by Wawa have stopped. The AG, acting on behalf of the CoP, came to an agreement with Wawa, and the activity purportedly in violation of the MSA ceased. Accordingly, the activity on which Sklaroff based his complaint has been settled to the satisfaction of all parties to the MSA, and there is no longer a live controversy.

Furthermore, as the lower court concluded, this case does not fall within any of the recognized exceptions to the mootness doctrine. First, "[w]hile violations of the Msa would be of great public importance, alleged violations that are 'expeditiously' and 'voluntarily' curtailed after the AG's intervention do not fall into [the category of cases involving 'great public importance']." Second, although it may be possible for the "provisions relating to billboard advertising [to] be violated in the future, such violations would be subject to review as an actual case or controversy" brought by the AG.

Finally Sklaroff has not, and cannot allege that he will "suffer some detriment without the court's decision." Accordingly, the lower court properly dismissed Sklaroff's complaint as moot.

[footnote] Sklaroff has attempted to put before the Court non-record "evidence" of advertising activity which occurred after he filed his complaint. However, these materials are not part of the record, and cannot be considered by this Court on appeal.

[footnote] [A number of cases demonstrate the mootness doctrine.] Unlike Sklaroff, the plaintiffs in each of these cases asserted that the action at-issue could escape review in the future and that they could suffer some detriment without immediate judicial action.

Here, PM is repeatedly disingenuous. The pattern is not moot, for it recurred and spread and continued after the AG expressed his public dismay; he said Wawa "reneged" and his jawboning failed to sway Sheetz. These data ARE part of the appeal, for the motion to deny my capacity to supplement the record is also subject to appeal (and is being appealed).

That this matter is of great public importance, therefore, is obvious, for the conduct of PM continues unabated DESPITE its having been communicated in the public media.

Clearly, the ability to trust a party to this gigantic MSA is the subject of daily debate in the media; clearly, the ability of such conduct to recur has been demonstrated; and, clearly, those youth who read the billboard ads are more apt to use tobacco products as a result.

Finally, I have repeatedly warned that this entire matter will escape judicial review until/unless I receive standing; thus, PM misrepresents, forgets, or consciously misleads when it avers otherwise. [The "Big Lie" is again afoot!]

D. There Are Additional Reasons, Not Addressed by the Court of Common Pleas, Why Sklaroff's Complaint Was Subject to Dismissal

1. Sklaroff Cannot Maintain an Action for Damages under the UTPCPL on Behalf of the Citizens of Pennsylvania

[This repeats point #B.]

[footnote] The UTPCPL does not explicitly provide for representative, group or class actions. Even if Sklaroff were to try to fashion some sort of class action out of his allegations, his allegations of fraud through "deceptive and confusing advertising" would be an inappropriate vehicle upon which to predicate a class action because of the necessity of showing that each person in the class acted in reliance upon PM's alleged misrepresentations. . . .

This serves as an admission that the UTPCPL does not explicitly PRECLUDE such actions, and it would be desirable—based upon the California precedent, for example—to do so. Thus, I should not be precluded from facilitating such work.

2. **Sklaroff Does Not Have Standing to Seek Injunctive Relief under the UTPCPL**

. . . .Only the AG or a DA may seek [an injunction]. Sklaroff has not pointed to any legal authority that would grant him the ability to seek injunctive relief on behalf of himself or the CoP because no such authority exists.

Again, I will flesh-out the California precedent.

3. Sklaroff's Allegations of Fraud Are Insufficient to State a Claim under the UTPCPL

Finally, Sklaroff's complaint is insufficient to maintain an action for fraud under the UTPCPL. . . .Despite the heightened pleading requirement for allegations of fraud, Sklaroff makes only blanket allegations that PM "promot[ed] advertising that is deceptive and confusing" and that PM "represent[ed] that tobacco has benefits and qualities that it does not have." . . . .

In my response, I will be certain to flesh-out each detail regarding fraud allegations that will meet PM's standards.

Appendix F
Sklaroff v. Fisher:
Complaint and Key Preliminary Objections (Excerpts)

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Robert B. Sklaroff, MD *Petitioner* *pro se* v. D. Michael Fisher, Esq. In His Official Capacity as Attorney General, Commonwealth of PA *Respondent*	Commonwealth Court of Pennsylvania Docket # 720 M.D. 1999

ORDER

AND NOW, this ---___ day of ----_____, the Attorney General of the Commonwealth of Pennsylvania is ordered to initiate a full investigation of the advertising and marketing practices that have been conducted and continue to be conducted by Philip Morris Incorporated since November 23, 1998.

_____
J.

To: All parties
You are hereby notified to file a written response to the following Complaint within thirty (30) days from service hereof or a judgment may be entered against you.

To: All non-respondent parties
If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of or application for intervention under Rule 1531 of the Pennsylvania Rules of Appellate Procedure within thirty (30) days.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Robert B. Sklaroff, MD *Petitioner* *pro se* v. D. Michael Fisher, Esq. In His Official Capacity as Attorney General, Commonwealth of PA *Respondent*	Commonwealth Court of Pennsylvania Docket # 720 M.D. 1999

COMPLAINT OF ROBERT B. SKLAROFF, MD

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Complaintant, Robert Sklaroff, M.D., respectfully requests Commonwealth Court to enjoin D. Michael Fisher—Attorney General of the Commonwealth of Pennsylvania—to investigate the conduct of Philip Morris Incorporated, and he avers in support thereof:

1. This Complaint involves the implementation of the Master Settlement Agreement ["MSA"] signed on November 23, 1998 between the Tobacco Industry ["TI"] and the Commonwealth of Pennsylvania ["CoP"]; the Attorney General ["AG"] has failed to ensure certain clauses thereof have been enforced, despite the fact that he has been informed (as has the perpetrator named herein) of alleged violations thereof by Philip Morris Incorporated ["PM"] both in May and in December of 1999.

2. The alleged violations of the MSA involve three distinct facets of the MSA: billboard advertising, youth advertising and youth access to free cigarettes; thus, both individually and in the aggregate, PM has allegedly demonstrated a pattern of behavior (with national implications) that the AG has refused to investigate.

3. Two other MSA-related cases filed by Dr. Sklaroff are pending, one dealing with the MSA itself (that is before the PA Supreme Court), and another dealing with the billboard advertising issue (that is before both the First Judicial District—Philadelphia—Court of Common Pleas and Commonwealth Court); these filings are mutually exclusive from the instant matter, although the billboard advertising (Wawa) case and this case demonstrate that Dr. Sklaroff has a number of active legally enforceable interests directly derivative from the disposition of the MSA.

JURISDICTIONAL STATEMENT

4. This Court has original jurisdiction in this matter pursuant to 42 Pa.C.S.A. 761; subparagraph (a) provides a specific statement ["The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings: (1) Against the Commonwealth, including any officer thereof, acting in his official capacity."] and subparagraph (b) provides absolutely that this jurisdiction is exclusive except as provided in section 721 relating to original jurisdiction of the Supreme Court.

PARTIES

5. Robert B. Sklaroff, MD is a physician (licensed in the CoP) and medico-political activist (particularly with regard to tobacco control, during the past two decades); as a medical oncologist, he harbors profound concerns with the grave threat that endemic tobacco abuse poses to worldwide public health.

6. Dr. Sklaroff is also a CoP resident and taxpayer; he was granted standing by the Commonwealth Court to challenge the CoP Insurance Commissioner's decision to provide de facto approval of the consolidation of Pennsylvania Blue Shield and Blue Cross of Western Pennsylvania (by having approved both the bylaws of a new company, "Highmark, Inc.," and the transfer of six subsidiaries thereto).

7. D. Michael Fisher, Esquire, is the CoP Attorney General; he had a major role in the negotiation of the MSA both nationally as well as on behalf of the CoP; yet, he has failed to enforce its tenets against PM, the leading member of the TI.

THE MASTER SETTLEMENT AGREEMENT

8. The MSA was executed in the CoP on November 23, 1998 by the AG and the TI; thus, certain of its tenets were made binding upon PM at various times thereafter.

9. Some facets of the MSA's "Permanent Relief" are to be effectuated only among Settling States; inasmuch as the MSA has not achieved state-specific finality in the CoP (due to Dr. Sklaroff's pending petition to achieve "standing" therein), only those clauses triggered on November 23, 1998 can be invoked in the CoP.

10. Those that reflect the MSA's intent in the CoP and that are applicable nationally (in the 80+ % of states that have now approved the MSA) include the following: "Prohibition on Youth Targeting. No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State." {III (a)}

11. Those already triggered and now applicable in the CoP include the following {These are also all excerpts from "III. Permanent Relief" in the MSA.}:

> "(d) Elimination of Outdoor Advertising and Transit Advertisements. Each Participating Manufacturer shall discontinue Outdoor Advertising and Transit Advertisements advertising Tobacco Products within the Settling States as set forth herein.
>
> > "(1) Removal. Except as otherwise provided in this section, each Participating Manufacturer shall remove from within the Settling States within 150 days after the MSA Execution Date all of its (A) [outdoor]

billboards. . .advertising Tobacco Products. . .

"(2) Prohibition on New Outdoor Advertising and Transit Advertise-ments. No Participating Manufacturer may, after the MSA Execution Date, place or cause to be placed any new Outdoor Advertising advertising Tobacco Products. . . within any Settling State. . . .

"(g) Ban on Youth Access to Free Samples. After the MSA Execution Date, no Participating Manufacturer may, within any Settling State, distribute or cause to be distributed any free samples of Tobacco Products except in an Adult-Only Facility.

For purposes of this Agreement, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with

(1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products . . .or

(2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

"(h) Ban on Gifts to Underage Persons Based on Proofs of Purchase. Beginning one year after the MSA Execution Date, no Participating Manufacturer may provide or cause to be provided to any person without sufficient proof that such person is an Adult any item in exchange for the purchase of Tobacco Products, or the furnishing of credits, proofs-of-purchase, or coupons with respect to such a purchase.

For purposes of the preceding sentence only,

(1) a driver's license or other government-issued identification (or legible photocopy thereof), the validity of which is certified by the person to whom the item is provided,

shall by itself be deemed to be a sufficient form of proof of age; and

(2) in the case of items provided (or to be redeemed) at retail establishments, a Participating Manufacturer shall be entitled to rely on verification of proof of age by the retailer, where such retailer is required to obtain verification under applicable federal, state or local law.

"(i) Limitation on Third-Party Use of Brand-Names. After the MSA Execution Date, no Participating Manufacturer may license or otherwise expressly authorize any third party to use or advertise within any Settling State any Grand Name in a manner prohibited by this Agreement if done by such Participating Manufacturer. Each Participating Manufacturer shall, within 10 days after the MSA Execution Date, designate a person (and provide written notice to NAAG [National Association of Attorneys General] of such designation) to whom the Attorney General of any Settling State may provide written notice of any such third-party activity that would be prohibited by this Agreement if done by such Participating Manufacturer itself. Following such written notice, the Participating Manufacturer will promptly take commercially reasonable steps against any such non-de minimis third-party activity. . . ."

12. National State-Specific Finality was announced on November 12, 1999, thereby triggering implementation of the MSA in the Settling States (but not in the CoP).

VIOLATIONS OF THE MSA

13. Twice during the 1999 calendar year, Wawa Food Markets employed billboard advertising to disseminate knowledge (indiscriminately, both to adults and youth) of the availability of Marlboro cigarettes (a product

manufactured by PM) at a reduced price; each of these billboards exceeded 14 square-feet and thus would have been prohibited under the MSA were Philip Morris to have posted them.

14. These billboards included the three words "Manufacturer Sponsored Promotion," documenting the support PM gave to this campaign, but PM spokespeople both disavowed the capacity to take commercially reasonable steps to curtail this effort (such as noticing Wawa it could not employ its logo or cite the availability of the "number-one selling brand") and failed to ensure this behavior would not recur.

15. The AG sought neither a fine for having engaged in prohibited behavior he had the responsibility to enforce nor a stipulated prohibition against future conduct; this dereliction of duty contrasted with the achievement of the Rhode Island AG when the United States Tobacco Company admitted to having violated the MSA ["Prohibition on Material Misrepresen-tation"] and *inter alia* was fined $15,000 and was forced to "publicize conclusions that smokeless tobacco can cause cancer." {5/10/99 Press Release}

16. At least five other distributors/retailers have posted billboard advertisements that violate the MSA, not only in the CoP (Sheetz) but throughout the United States (California, New Mexico, Wyoming and Kentucky).

17. The CoP AG was aware of this conduct in May, 1999 {according to press reports} but did nothing (either at that time or since that time) to investigate whether PM was engaging in a pattern of misconduct (either in the CoP or in any other state).

18. After Wawa reinstituted its billboard advertising campaign, the CoP AG wrote a letter to that corporation accusing it of having "reneged" on its prior agreement; nevertheless, no effort was made to inquire as to the potential involvement of PM in this series of events, and the AG's spokesperson averred that the matter was viewed as having been resolved once Wawa had again agreed to remove the ads.

19. In November, 1999, PM financed publication of a glossy-insert advertisement in a weekly newspaper [the City Paper] that is distributed for free in Philadelphia and is placed in public areas where youth can easily acquire it; the ad prominently depicted minority teenagers who were attractively dressed and accessorized (promoting sale of Salem cigarettes) who were moving "Fast. Forward."

20. On September 29, 1999, PM financed distribution of an unsolicited letter that offered free samples of Virginia Slims cigarettes merely following provision of a signature and a Date-of-Birth, without the necessity to provide any proof thereof.

21. On its Web-Site (in the form of a press release), PM stated its corporate policy thusly [as quoted on December 19, 1999]: "Philip Morris U.S.A. notes final approval of Master Settlement Agreement. Encourages states to devote released funds to youth smoking prevention initiatives. November 12, 1999 – Last year Philip Morris USA and other major tobacco companies entered into a comprehensive settlement with the Attorneys General of forty-six states and five territories. This agreement fundamentally changes how tobacco is marketed, advertised and promoted in the United States, while providing the states an opportunity to fund programs to help reduce the incidence of youth smoking.

" 'The settlement agreement is proof that responsible people can find areas of common agreement and work together in a constructive manner,' said Ellen Merlo, Senior Vice President, Corporate Affairs for Philip Morris USA. "Most of the changes the agreement calls for, including the removal of all billboard and transit advertising, have already been implemented, and now funds from last year' tobacco settlement will be released to states that have given final approval to the agreement. These states are scheduled to receive their first settlement payments shortly.

"State legislatures across the country have been actively debating how to best spend their funds. In the spirit of the Master Settlement Agreement, Philip Morris USA is actively supporting efforts to dedicate settlement funds to youth smoking prevention efforts.

" 'We are pleased that the settlement funds will soon be on their way to the states, many of which have already taken steps to fund comprehensive programs to prevent youth smoking.' Said Merlo. 'We hope that legislators in each state will devote a significant portion of their settlement funds to pay for a comprehensive state program to reduce the use of, and access to, tobacco products by minors.'

" 'Our company believes the settlement provides an unprecedented opportunity to design and implement programs that can have a positive impact on reducing the incidence of youth smoking,' said Merlo.

"Most experts agree that a comprehensive effort should include advertising campaigns, educational programs in schools, community-based programs that promote positive youth development, and enhanced access prevention and enforcement efforts. Philip Morris USA hopes that a comprehensive state plan will also provide for tracking of youth smoking incidence over the years and will measure the effectiveness of youth smoking prevention programs. "Philip Morris USA makes these

recommendations in the spirit of cooperation as the company enhances its own efforts to help prevent youth smoking. In 1998, Philip Morris USA created a Youth Smoking Prevention department whose sole goal is to develop and support programs to help reduce the incidence of youth smoking. In 1999 and 2000, the Company has voluntarily devoted more than $100 million each year to a substantive and long-term effort that will combine Communication, Education, Community Action and Access Prevention initiatives.
" 'Philip Morris USA is committed to taking responsible action on this issue, just as we are sincerely committed to full compliance to both the spirit and the letter of the Master Settlement Agreement,' said Ellen Merlo. 'To that end, we will continue to work with all those who are responsibly committed to achieving a measurable reduction in youth smoking.' "

22. The above corporate policy statement was consistent with the MSA's mandate {III (l)}, in pertinent part: "Corporate Culture Commitments Related to Youth Access and Consumption. Beginning 180 days after the MSA Execution Date, each Participating Manufacturer shall (1) promulgate or reaffirm corporate principles that express and explain its commitment to comply with the provisions of this Agreement and the reduction of use of Tobacco Products by Youth, and clearly and regularly communicate to its employees and customers its commitment to assist in the reduction of Youth use of Tobacco Products."

23. It is therefore averred that PM continues to advertise and market its Tobacco Products (Marlboro, Salem and Virginia Slims) both in the CoP and throughout the United States to Youth, in contravention of the MSA and its contempo-raneous statement of corporate philosophy.

24. These [appended] data were submitted to the AG on December 3, 1999, but he failed to act; it is therefore averred that he does not intend to discern whether PM's marketing practices violate the MSA, the enforcement of which he covets.

RELIEF SOUGHT

25. Dr. Sklaroff respectfully requests this Court issue an Order mandating the AG investigate the current advertising and marketing activities of PM; in the alternative, Dr. Sklaroff respectfully requests this Court to issue an Order that would afford him standing to pursue this investigation (as a "private AG" or in any other capacity deemed appropriate).

Respectfully submitted,

s/ Robert B. Sklaroff, MD
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Pro Se

[Certificate of Service appended]

BRIEF OF D. MICHAEL FISHER
OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA

This Document was filed on April 3, 2000 before the Commonwealth Court, Commonwealth of Pennsylvania; Arguments raised in opposition to efforts to gain standing have been quoted in their entirety. [Omitted are two other issues related to service (via Fed Ex, Certified Mail) and to attachment of the MSA (which had been excerpted, pursuant to the rules); they be rectified on 5/3/2000 (by using US Mail, and by remitting the complete MSA).]

Respondent's Preliminary Objection in the Nature of a Demurrer Should be Sustained Because Petitioner Lacks Standing to Enforce the Master Settlement Agreement.

A preliminary objection in the nature of a demurrer tests the legal sufficiency of the challenged pleading. *Willet v. PA Medical Catastrophe Loss Fund*, 549 Pa. 853, 702 A.2d 850 (1997). When raised, a demurrer admits as true all well-pleaded, material, relevant facts and every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 507 Pa.360, 372, 490 A.2d 402, 408 (1985). A Court should sustain a demurrer where the complaint is insufficient to establish the pleader's right to relief. *Willet v. PA Medical Catastrophe Loss Fund, supra*, 549 Pa. At 619, 702 A.2d at 853. Respondent's demurrer should be sustained in this case because petitioner has not demonstrated that he has standing to enforce the MSA.

Standing is the requirement that the person bringing an action be adversely affected by the matter they [sic] seek to challenge, to assure that they are an appropriate party to bring the matter to a judicial resolution. *Drummond v. Univ. of PA.*, 651 A.2d 572, 577 (Commonwealth Ct. 1994), *app. Denied*, 541 Pa. 628, 661 A.2d 875 (1995).

To determine whether petitioner has standing to bring this action against the Attorney General on the grounds set forth in his petition for review, it is necessary to analyze whether he has been "aggrieved" by some action by the respondent. *Beers v. Com. Of Pa.*, 534 Pa. 605, 633 A.2d 1158, 1161 (1992) ("to have sanding to challenge an official order or action, a party must be aggrieved thereby"). To be aggrieved, a party must:

(a) have a substantial interest in the subject matter of the litigation;

(b) the interest must be direct; and

(c) the interest must be immediate and not a remote consequence.

Beers, supra, 534 Pa. At 611, 633 A.2d at 1161. To establish standing, a plaintiff "must allege and prove an interest in the outcome of the sort which surpasses 'the common interest of all citizens in procuring obedience to the law.' " *Biester v. Thornburgh* 487 Pa. 438, 442, 409 A.2d 848, 451 (1979).

Dr. Sklaroff's only asserted interest is his "profound concerns with the grave threat that endemic tobacco abuse poses to worldwide public health," Petition for Review, ¶ 5. This interest does not surpass the common interest and is not direct and immediate. It is one shared by all Pennsylvania citizens.

Nor has Dr. Sklaroff established standing against the Attorney General based upon his status as a party to the MSA. Nowhere in his petition for review does petitioner allege that he was a signatory or party to the MSA. A settlement agreement can only be enforced by parties to it and not by third parties. *Yackobouitz v. SEPTA*, 590 A.2d 40, 52 (Commonwealth Ct. 1991), *app. dismissed*, 533 Pa. 109, 619 A.2d 1354 (1993).

The Attorney General's demurrer should be sustained because Dr. Sklaroff lacks standing.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert B. Sklaroff, MD *Petitioner* *pro se* v. D. Michael Fisher, Esq. In His Official Capacity as Attorney General, Commonwealth of PA *Respondent*	Commonwealth Court of Pennsylvania Docket # 720 M.D. 1999

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S PRELIMINARY OBJECTIONS

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Statement of the Case

This is an action by a citizen (Robert Sklaroff, M.D.) who seeks to compel the Attorney General [AG] of the Commonwealth of Pennsylvania [CoP] to investigate the conduct of Philip Morris Incorporated [PM], a member of the Tobacco Industry [TI]. The intent of his "Petition for Review" is to ensure the Master Settlement Agreement [MSA] between the CoP and the TI is enforced. Dr. Sklaroff was not a party to the MSA but, putatively, he was included as a "Releasing Party" thereof; he claims he has "Standing," both in this venue and in others (CoP Superior Court and United States Supreme Court). Thus, he requests Commonwealth Court to enjoin the AG (D. Michael Fisher, Esquire) to fulfill the responsibilities of his public office; in the alternative, he requests empowerment to investigate PM's conduct (as a "private AG" or in any other capacity). This brief is intended to address and/or resolve the AG's Preliminary Objections, pursuant to his brief that was filed with the Commonwealth Court on April 3, 2000, and it will encompass issues that have been directed at other courts dealing with the MSA.

Facts

The facts of the case are precisely as the AG has depicted, although certain key facets thereof will be inserted within his rendition to ensure completeness and clarity.

The MSA was signed on November 23, 1998, but is currently being challenged before the United States Supreme Court. It contains *inter alia* provisions that prohibit youth targeting in the advertising, promotion and/or marketing of tobacco products; eliminate outdoor and transit advertising; prohibit free distribution of tobacco product samples to youth; and prohibit giving cigarettes as gifts to youth or the exchange of coupons or proofs-of-purchase for the purchase of tobacco products.

Dr. Sklaroff asserts that PM is in violation of these provisions, and that he has written to the AG alerting him to these alleged violations. Although he is aware that one telephone call was made to his patient regarding one such alleged violation in January, nothing has transpired since then regarding that matter and the AG has not investigated his other complaints. He recognizes the existence of the AG's prosecutorial discretion, but he wants Commonwealth Court to direct the AG to act in this matter due to the great public health implications thereof and in light of the many statements issued by the AG with regard to this particular matter (inclusive of those reassurances that helped convince the original Trial Court to approve the MSA on January 13, 1999 without deleting or modifying the onerous immunity/offset clauses therein).

Dr. Sklaroff's Complaint has been "regarded and acted upon" by the AG as a "Petition for Review"; it may be noted that the original Trial Court judge advised that this approach be adopted, as he was rejecting Dr. Sklaroff's request for standing to challenge PM's conduct. [This decision is currently under appeal before the CoP Superior Court.]

Statement of Issues

1. Whether Respondent's Preliminary Objection In The Nature Of A Demurrer Should Be Sustained Because Petitioner Has No Standing To Enforce The MSA?

2. Whether Respondent's Preliminary Objection Alleging Improper Service Should Be Sustained Because Service Was Not Accomplished In Person Or By Certified Mail?

3. Whether Respondent's Preliminary Objection Alleging Non-Compliance With Rule 1019 Should Be Sustained Because Petitioner Failed To Attach A Copy Of The MSA To His Pleading?

*

Argument

1. Whether Respondent's Preliminary Objection In The Nature Of A Demurrer Should Be Sustained Because Petitioner Has No Standing To Enforce The MSA?

The issue of "Standing" is thoroughly reviewed in the appended Writ of Certiorari that was filed with the United States Supreme Court {Appendix A}. Although this Writ will be refiled (after certain reformatting requests of the Clerk have been satisfied), it is included herein to refute the allegation that "Dr. Sklaroff's only asserted interest is his 'profound concerns with the grave threat that endemic tobacco abuse poses to worldwide public health.' " Indeed, each of the points in the Writ is adopted by-reference herein, for he has standing as a citizen, taxpayer, father, activist, physician and litigant {pp. 13-20}.

He also, in particular, claims standing as a private-AG. This criterion was raised specifically {p. 15, top ¶} while citing this Court's Opinion in the SCRUB case, as having been defined as a party "who may not carry a substantial, direct or immediate interest in the subject matter of the litigation [but] who may be conferred with standing because he shares a common interest with citizens or taxpayers in general."

In this regard, a recent (April 3, 2000) ruling in San Diego, California is on-point. In Daniels et al v. Philip Morris, et al, [SDSC Case No. 719446], class certification was denied in an action intended to eliminate the advertising and promotion of cigarettes that unlawfully encourages minors to smoke. Judge Ronald S. Prager's rationale follows:

> Specifically, the relief sought by Plaintiffs as identified by way of a review of the prayer for relief in the operative second amended complaint, for injunctive relief, resolution of funds conferred and disgorgement of ill-gotten gains, is readily and fully potentially available under the provisions of B & P § 17200, *et seq*. . . .Thus, an effective form of class-wide relief is available to fully compensate Plaintiffs in the event they prevail in the absence of class certification. [emphasis added]

[Thus, Plaintiffs are proceeding with merits discovery.] The regulation under which California citizens now have standing is in the "Business and Professions Code": "Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Comparable statutes exist in the CoP; the UTPCPL (73 P.S. § 201-4) authorizes the AG to seek injunctive relief to enjoin fraudulent trade practices that violate the statute.

Dr. Sklaroff asserts that he has a direct, immediate and substantial interest in the subject matter herein as a citizen who has a "legally enforceable interest" as documented by his ongoing litigation (regarding the financing of Wawa Billboard advertising by PM) that represents a case or controversy continuing to be ripe for adjudication (and isn't moot). Dr. Sklaroff asserts that he has been aggrieved as a father of a 9-3/4 year-old son, Michael David Sklaroff (noting that the original litigation was filed as *parens patriae*). Dr. Sklaroff asserts that he has standing as a taxpayer (under each of the Biester criteria). Dr. Sklaroff asserts that he has standing as a physician-activist (recalling *inter alia* his having been granted standing by this Court with regard to the Blues Consolidation).

Although the AG asserts that a "settlement agreement can only be enforced by parties to it and not by third parties," the involvement of the AG in his official capacity ("on behalf of the CoP") in the instant case yields the necessity to invoke the AG within this additional context (i.e., not just as a settling party). Also, Judge Herron has noted the precedent for assertion of third-party efforts to obtain party status in this regard.

In the aggregate, all CoP Courts (primary and appellate) appear to have adopted a "NIMBY" approach to the MSA. [Each has determined, for disparate reasons, that this issue is "Not In My Back Yard."] Judge Herron looked to "another court, another time," when petitioners (both activists and the County of Allegheny) sought a stipulation that would exclude them as settling parties (noting the AG asserted he wasn't so empowered), as he provided Trial Court approval of the MSA.

Judge Herron then looked to this Court when this petitioner, Dr. Sklaroff, sought to enforce the MSA; he even denied a motion to supplement the record with contemporaneous data disproving his prior determination—that the case was moot—by documenting the billboards had again been posted.

Meanwhile, PM has predictably invoked the MSA as a shield against being directly subject to challenge with regard to its alleged financing of billboard advertising, and the AG has failed to become involved in this or in any other litigation while another entity (Sheetz) has emulated unchallenged behavior (by Wawa) by posting tobacco billboards.

The MSA's approval in the CoP has not yet been finalized, inasmuch as the filing of Dr. Sklaroff's Writ of Certiorari will be viewed as timely as long as it has been received by Memorial Day {Appendix C}. Thus, the Billboard Restrictions (which are not contingent upon state-level approval) are most-definitely applicable to PM, whereas the putative immunity clauses in the MSA are most-definitely not applicable to PM.

2. Whether Respondent's Preliminary Objection Alleging Improper Service Should Be Sustained Because Service Was Not Accomplished In Person Or By Certified Mail?

Dr. Sklaroff provided service via the equivalent of First Class Mail (as noted on his Certificate of Service) by his having remitted the document via the equivalent of Certified Mail (Fed-Ex) {Appendix D}. Although it is obvious that the AG received it (inasmuch as he appended it to his April 4, 2000 submission to the Court), it will be both appended to this document {Appendix E}, again remitted via Certified Mail (Fed-Ex), and noted to have been sent in this "certified" fashion on the Certificate of Service.

3. **Whether Respondent's Preliminary Objection Alleging Non-Compliance With Rule 1019 Should Be Sustained Because Petitioner Failed To Attach A Copy Of The MSA To His Pleading?**

Dr. Sklaroff followed Rule 1019 with precision, inasmuch as he cited "the material part" of the MSA (at length) in his Complaint/Petition. Nevertheless, although the AG obviously has a copy of what he has, himself, helped to compose, another copy will be appended to this document {Appendix F}.

Update

Although the Complaint/Petition remains materially operational, certain points merit an update; none undermines any previous averments, but each provides additional focus thereto. It is instructive that the AG failed to challenge any of them in his Motion, for denial of Preliminary Objections will force him to articulate his positions thereupon. Interim events (such as the Engle Verdict, in Florida) illustrate the inherent danger when indemnifying the TI, as well, but they will not be detailed/discussed at this time.

1. PM's alleged violations (in May and in December of 1999) could recur, inasmuch as no legal action has yielded a court order that would prohibit same, either in the CoP or anywhere in the United States.

2. The alleged violations of the MSA (billboard advertising, youth advertising and youth access to free cigarettes), continue to demonstrate a pattern of behavior (with national implications) that the AG has refused to investigate.

3. Two other MSA-related cases filed by Dr. Sklaroff are pending, one dealing with the MSA itself (that is before the US Supreme Court), and another dealing with the billboard advertising issue (that is before the CoP Superior Court).

JURISDICTIONAL STATEMENT

4. The AG has not challenged the assertion that this Court has original jurisdiction in this matter pursuant to 42 Pa.C.S.A. ¶ 761.

PARTIES

5. The AG incompletely cited the assertion of standing by Robert B. Sklaroff, MD when he only cited his "profound concerns with the grave threat that endemic tobacco abuse poses to his patients and to worldwide public health" in his brief; Dr. Sklaroff reasserts this posture, within the context of his self-identification as a party, while reserving the right to have amplified thereupon (*vide infra*).

6. Dr. Sklaroff is also a CoP resident and taxpayer; he was granted standing by the Commonwealth Court to challenge the CoP Insurance Commissioner's decision to provide *de facto* approval of the consolidation of Pennsylvania Blue Shield and Blue Cross of Western Pennsylvania (by having approved both the bylaws of a new company, "Highmark, Inc.," and the transfer of six subsidiaries thereto). This matter continues to pend before the Insurance Department, and Dr. Sklaroff has achieved "independent" party status, co-equal with that of two organizations (Pennsylvania Society of Internal Medicine and Pennsylvania Medical Society).

7. D. Michael Fisher, Esquire, is the CoP Attorney General; he had a major role in the negotiation of the MSA both nationally as well as on behalf of the CoP; yet, he has failed to enforce its tenets against PM, the leading member of the TI. Indeed, this inactivity continues despite receipt of one investigatory call by a patient of Dr. Sklaroff's from the AG's office during the month of January.

THE MASTER SETTLEMENT AGREEMENT

8. The MSA was executed in the CoP on November 23, 1998 by the AG and the TI; thus, at various times thereafter, certain of its tenets were made binding upon PM. The Billboard Advertising proscription was among them.

9. Although state-specific finality has not yet been achieved in the CoP (due to the pendancy of the US Supreme Court Writ of Certiorari), certain clauses affording Permanent Relief were activated on November 23, 1998.

10. Those that reflect the MSA's intent in the CoP and that are applicable nationally include the Prohibition on Youth Targeting.

11. Those already triggered and still applicable in the CoP include the Elimination of Outdoor Advertising and Transit Advertisements, Prohibition on New Outdoor Advertising and Transit Advertisements, Ban on Youth Access to Free Samples, Ban on Gifts to Underage Persons Based on Proofs of Purchase, and Limitation on Third-Party Use of Brand-Names.

12. National State-Specific Finality was announced on November 12, 1999, thereby triggering implementation of the MSA in the Settling States (but not the CoP); thus, certain immunity clauses therein cannot be invoked by the settling parties.

VIOLATIONS OF THE MSA

13. Twice during the 1999 calendar year, Wawa Food Markets employed billboard advertising for Marlboro Cigarettes that would have been prohibited under the MSA were Philip Morris to have posted them.

14. Some billboards included the three words "Manufacturer Sponsored Promotion," documenting the support PM gave to this campaign, but PM spokespeople both disavowed the capacity to take commercially reasonable steps to curtail this effort (such as noticing Wawa it could not employ its logo or cite the availability of the "number-one selling brand") and failed to ensure this behavior would not recur.

15. The AG sought neither a fine for having engaged in prohibited behavior he had the responsibility to enforce nor a stipulated prohibition against future conduct; this dereliction of duty contrasted with the achievement of the Rhode Island AG when the United States Tobacco Company admitted to having violated the MSA ["Prohibition on Material Misrepresentation"] and *inter alia* was fined $15,000 and was forced to "publicize conclusions that smokeless tobacco can cause cancer." {5/10/99 Press Release} The AG continues to refrain from such efforts.

16. At least five other distributors/retailers have posted billboard advertisements that violate the MSA, not only in the CoP (Sheetz) but throughout the United States (California, New Mexico, Wyoming and Kentucky). No AG has acted thereupon.

17. The CoP-AG was aware of this conduct in May, 1999 but has done nothing to investigate whether PM was engaging in a pattern of misconduct (either in the CoP or in any other state).

18. After Wawa reinstituted its billboard advertising campaign, the CoP-AG wrote a letter to that corporation accusing it of having "reneged" on its prior agreement; nevertheless, no effort was made to inquire as to the potential involvement of PM in this series of events, and the AG's spokesperson averred that the matter was viewed as having been resolved once Wawa had again agreed to remove the ads. The AG has not addressed the fact that nothing precludes recidivism, particularly in light of the behavior of Sheetz.

19. In November, 1999, PM financed publication of a glossy-insert advertisement in a weekly newspaper that depicted minority teenagers promoting sale of cigarettes. It is unclear whether this conduct has occurred elsewhere (or recurred in the CoP).

20. On September 29, 1999, PM financed distribution of an unsolicited letter that offered free samples of Virginia Slims cigarettes merely following provision of a signature and a Date-of-Birth, without the necessity to provide any proof thereof. It is unclear whether this conduct has occurred elsewhere (or recurred in the CoP).

21. Philip Morris continues to assert its corporate culture has integrated activities intended to restrict access of cigarettes to youth, despite contrary conduct.

22. The above corporate policy statement was consistent with the MSA's mandate, but it continues to belie ongoing conduct (such as allowing cigarettes to be sold through vending machines to which children can gain ready-access).

23. PM continues to advertise and market cigarettes in contravention of the MSA and statements of corporate philosophy. Nothing has changed during interim months.

24. The AG continues to fail to enforce the MSA, despite verbal assertions. Indeed, illustrative of the dangerous arrogance of PM, it asserts "Even if Sklaroff were to maintain an action against the AG, he would still be without standing to maintain a suit against PM to enforce the terms of the MSA" {Appendix F, page 16}.

RELIEF SOUGHT

25. Dr. Sklaroff respectfully requests this Court issue an Order mandating the AG investigate the current advertising and marketing activities of PM; in the alternative, Dr. Sklaroff respectfully requests this Court to issue an Order that would afford him standing to pursue this investigation (as a "private AG" or in any other capacity). This request is unchanged.

Conclusion

For all the foregoing reasons, petitioner asks the Court to deny the AG's preliminary objections and uphold the Petition for Review.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 20 2000
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No. ____

In The
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI ADDENDUM

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May 29, 2000

36pp

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*

Rule 14.1 (i) (vi) allows for submission of an Appendix that contains "any other material the petitioner believes essential to understand the petition." In addition to that which follows the Writ, these documents are felt to meet this criterion. The first represents a minor "typo"; the second represents the formal document filed in response to a related matter, and the third includes explanatory material unavailable elsewhere and complementary to legal arguments contained in the writ.

Specifically, use in the MSA of the Offset is unprecedented, as is illustrated by its sporadic appearance in other settings. Dr. Sklaroff's ability to participate in other causes of action would be significantly stifled were the MSA to be in-force. The Biester exception carries great implications, involving both taxpayer suits and that which relates to the UTPCPL. And cursory analysis of the MSA reveals fundamental flaws.

1. Erratum for Writ

Delete "'s" after "Sklaroff" (footnote #12, page #9).

*

2. Sklaroff v. Fisher – Filing (starts on next page)

IN THE SUPERIOR COURT OF PENNSYLVANIA

ROBERT B. SKLAROFF, MD
pro se
--Plaintiff,

v.

PHILIP MORRIS, INC.,
--Defendant
SUPERIOR COURT
Docket No. 225 EDA-2000

Trial Court Docket:
May Term, 1999; No.2

BRIEF OF PLAINTIFF, ROBERT B. SKLAROFF, MD, GENERATED IN THE FORMAT OF A PRINCIPAL BRIEF IN RESPONSE BOTH TO APPELLEE'S REPLY BRIEF AND TO APPELLEE'S MOTION TO QUASH APPEAL [COMPLYING WITH PAGE-LIMITS ASSOCIATED WITH REPLY-BRIEFS]

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May 9, 2000

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2. Dr. Sklaroff Has Standing As A Taxpayer To Enforce The MSA.

B. The Complaint Should Not Be Dismissed Because The Claims It Seeks To Adjudicate Have Not Become Moot.

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I. INTRODUCTION

Dr. Sklaroff files this Brief in furtherance of his ongoing effort to ensure compliance with the Master Settlement Agreement ["MSA"] by Philip Morris Incorporated ["PM"], a member of the Tobacco Industry ["TI"] that signed this document *inter alia* with the Attorney General ["AG"] of the Commonwealth of Pennsylvania ["CoP"].

A. This Brief Meets Two Goals: To Respond To Appellee's Brief And To Render As Moot Appellee's Motion To Quash The Appeal.

This is filed in response to the two documents filed by Appellee PM on April 20, 2000. It subsumes the initial Brief—which presented argument in a format that facilitated refuting the Opinion and PM's views—through its reorganization into a unitary structure. It also encompasses arguments raised in PM's Brief, citing also those points on which PM remained silent. Finally, it mainstreams information filed both with the Commonwealth Court (regarding litigation intended to force the AG to enforce the MSA) and the United States Supreme Court (regarding litigation intended to amend the MSA).

This reformulation of previously-submitted arguments thereby renders as moot the motion to quash this appeal, despite the fact that the information conveyed therein was not appreciably altered in the process of generating this document. Appropriate citations of legal literature have been previously submitted, so this effort is again intended to yield a concise articulation of the inherent contradictions being promulgated by PM herein. Emphasized herein *seriatim* is that PM and the AG pledged to uphold the MSA; PM promptly violated it; the AG failed to enforce it; and both resist outside influence. [The AG predictably averred this, as documented in his recent filing; see Appendix.]

B. Dr. Sklaroff Intends To Modify—Not Derail—The Master Settlement Agreement Through Three Distinct Litigation Efforts.

The AG sued the TI in his official and representative capacity "pursuant to his authority under 71 Pa.C.S. 732-204, 73 Pa.C.S. 201-204 and 73 Pa.C.S. 201-208 and in *parens patriae* on behalf of the citizens of Pennsylvania, including its children and adolescents, to protect their health and welfare, and to recover damages the Commonwealth **and its citizens** have sustained as a result of the unlawful and concerted action of the defendants, as well as injunctive relief." Yet, the courts failed to weigh the merits of the MSA to ensure it was fair, reasonable and adequate. Were they to have discharged this duty, they would have found two clauses (immunity and offset)—individually and collectively—to be complex, excessively ambiguous, *ultra vires*, overly-broad, and inconsistent with public policy.

Thus, Dr. Sklaroff sued to attain standing to alter the MSA. When PM financed Wawa billboard advertising and the AG failed to enforce the MSA, he sued PM. When it was claimed that only the AG could enforce the MSA, he sued the AG to attain this end. Thus, on the one hand, Dr. Sklaroff is attempting to ensure compliance with the MSA; on the other hand, Dr. Sklaroff is attempting to modify its egregious phraseology.

C. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene In Each Of These Cases, Under State And Federal Law, Based Upon His Current & Future Civil And Due-Process Constitutional Rights.

The AG has failed to investigate and to prosecute PM for having abrogated the MSA; this relates both to its billboard advertising and its promotion of tobacco use among youth through both print advertising and mail solicitation. Dr. Sklaroff has been forced to act.

By having initiated a "Manufacturer Sponsored Promotion," PM violated the MSA's "Third Party" and "Billboard Advertising" sections; the AG acknowledged this violation, even as he focused on Wawa's having "reneged" on an agreement to cease and desist.

D. Dr. Sklaroff Hereby Appeals Two Decisions Rendered By The Lower Court: He Merits Standing And The Record Should Be Supplemented By Information That Refutes Alleged Mootness Of This Litigation.

The Opinion rejected standing because of the alleged mootness of the challenged conduct and because of the alleged inability to differentiate Dr. Sklaroff's status from that of the general public. Rejected also was an effort to supplement the record with documentation that the challenged conduct was ongoing; the latter occurred without explanation. Thus, this appeal is intended to reverse both decisions with particular regard to the billboards—thereby permitting discovery of the contractual relationship between Wawa and PM—and with regard also to other facets of PM conduct which putatively violate the MSA. That this suit allegedly doesn't test the limits of the MSA's Release Clause is irrelevant; the double-goal was to see that the MSA was enforced (enjoining and fining PM) and to show the TI must not be provided immunity for future behavior that might be portrayed as pursued in the course of normal business activity (a behavioral "black hole").

II. SCOPE AND STANDARD OF REVIEW

This review of a trial court's sustaining of preliminary objections in the nature of a demurrer is plenary; they should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. The Superior Court will reverse this decision only if the Trial Court committed an error of law or an abuse of discretion. [PM's citation of this responsibility was co-adopted.]

III. STATEMENT OF QUESTIONS INVOLVED

A. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene, Based Upon His Current And Future Civil And Due-Process Constitutional Rights.

1. Dr. Sklaroff Is A Party Affected By The MSA.

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2. Dr. Sklaroff Can Seek Injunction As A Private Attorney General.

3. Dr. Sklaroff's Allegations Of Fraud Suffice For A UTPCPL Claim.

D. Dr. Sklaroff Attached Writings.

E. The Record Should Be Supplemented By Information That Refutes The Alleged Mootness Of This Litigation.

IV. STATEMENT OF THE CASE

As was noted by PM, this case was initiated due to PM's alleged violations of the MSA, sustained due to the AG's failure to ensure the challenged conduct didn't recur, and appealed due to the lower court's order affirming PM's preliminary objections. As was not noted by PM, this appeal encompasses also the decision of Judge Herron to refuse to allow the record to be supplemented by incontrovertible evidence of PM's recidivism.

V. SUMMARY OF THE ARGUMENT

The lower court committed an error of law and abused its discretion when it sustained PM's preliminary objections to Dr. Sklaroff's complaint and when it refused to allow the record to be supplemented by proof that Dr. Sklaroff's complaint was not moot.

Dr. Sklaroff has standing to enforce the MSA (both directly and through the UTPCPL) because he is a third-party beneficiary, and he functions *inter alia* as a Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant. PM and the AG would now deny him standing to enforce the MSA, concomitant to prior efforts of these Settling Parties to deny him standing to amend it so he could be empowered to enforce it.

Although the initial PM-sponsored promotion ended in May, 1999 (with voluntary removal of the billboards), it predictably recurred in December, 1999 (due *inter alia* to the absence of an Injunction or a Stipulation that this behavior not be permitted). . .and this conduct was amplified both within Pennsylvania (by Sheetz) and nationally (in four other states: California, Kentucky, New Mexico, Wyoming). It presumably continues.

VI. ARGUMENT

PM has corrupted Dr. Sklaroff's previously-detailed points, instead of refuting them. Indeed, PM failed to address the *italicized* critique of each point made in the Opinion; rather, PM misrepresented fundamental concepts clearly articulated in prior briefs.

A. Dr. Sklaroff—Functioning As A Citizen, Taxpayer, Father, Activist, Physician, Private Attorney General And Litigant—Merits Standing To Intervene, Based Upon His Current And Future Civil And Due-Process Constitutional Rights.

PM failed to address (let alone refute) extensively-documented "standing" arguments based both on tobacco-related activity and generic medical-political activity. Indeed, Dr. Sklaroff finds it difficult to conjure what else he could/should do or have done to attain standing in myriad Pennsylvania courts. And PM noted it would not have to comply with any subsequent action(s), even were Dr. Sklaroff to force the AG to act.

1. Dr. Sklaroff Is An Intended Beneficiary Of The MSA.

PM averred that Dr. Sklaroff failed to allege he has standing as a third-party beneficiary to the MSA. This is not true but, rather than dispute PM, the allegation is hereby issued. Dr. Sklaroff has this status because the Settling Parties expressed an intention to benefit the third party (as a CoP citizen) and the MSA purportedly has been generated to satisfy their obligation to give *inter alia* Dr. Sklaroff the benefit of the promised performance[1].

[1] PM argues "the MSA does not express an intention to benefit Sklaroff; on the contrary, it expressly limits its enforcement to the attorneys general of the Settling States, including Pennsylvania."

PM quoted two cases to yield the conclusion that contractual language should determine whether any third-party beneficiary had rights; this, however, begged the question, inasmuch as such language isn't *sui generis* controlling; despite its existence, contacts and wills (e.g., Girard College) have been punctured, let alone court-approved settlements.

PM tries to marginalize this effort to gain standing, failing to address other recognized methods by which such status may be attained. Dr. Sklaroff would act as *parens patriae*, on behalf of his 9-3/4 year-old son, who most definitely is a **named** beneficiary of both the original complaint and the subsequent MSA. Dr. Sklaroff would act as would a physician-activist who is attempting to litigate so as to enforce (and to fix) the MSA. Yet, PM fails to address all these reasons for standing along with others averred previously (e.g., having achieved this status after having challenged the consolidation of the Blues). Finally, PM fails to address views articulated by Commonwealth Court Judge Kelley, particularly with regard to the necessity to empower **someone** to represent youth's views.

Paradoxically, after having argued Dr. Sklaroff lacks standing, regardless of his posture, PM then argues Dr. Sklaroff pleads an interest common to all Pennsylvanians. To do this, PM again selectively excerpts from Dr. Sklaroff's prior statements. It accurately quotes Dr. Sklaroff's assertion of "a direct, substantial and immediate interest in the necessity for PM to comply with the MSA," but then ignores other averments demonstrating that he is "aggrieved" by its actions against youth (**both** his son **and** all children in the

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This is an obvious *non sequitur*, inasmuch as intent to benefit Dr. Sklaroff (i.e., by providing *inter alia* allocated payments) need not be manifest solely as whether Dr. Sklaroff is empowered to enforce its tenets. That PM argues the MSA is not intended to benefit **any** citizen contradicts public statements regarding alleged corporate goals. And that PM portrays an unrelated MSA quotation by Dr. Sklaroff as proving a recognized enforcement limit is most disingenuous, inasmuch as the MSA was cited for completeness, within a different context.

CoP), and that he has sought both an injunction and damages correlative to this pattern of conduct (which is ongoing and yields the view that PM is able to violate the MSA with abandon).

2. Dr. Sklaroff Has Standing As A Taxpayer To Enforce The MSA.

PM accurately quotes Biester when noting that a taxpayer may establish standing when his interest is not substantial, direct or immediate when he is challenging certain governmental actions. It then notes that, to have this type of standing, a plaintiff must still "allege and prove an interest in the outcome of the suit which surpasses 'the common interest of all citizens in procuring obedience to the law.' " PM concludes otherwise, and thereby fails to "reach" (let alone refute) the five criteria Dr. Sklaroff alleges he meets[2].

Not withstanding previously-articulated argument that Dr. Sklaroff has interests that are separate and distinct from those of the public, PM also avers Dr. Sklaroff doesn't merit taxpayer standing because he is allegedly not challenging "an obligation placed on the general public or an emolument given through the exercise of governmental power." Specifically, PM avers cases recognizing taxpayer standing "have necessarily involved claims against some form of governmental authority or activity." PM then concludes that "Pennsylvania courts have not permitted taxpayer standing for private plaintiffs seeking to enforce the terms of a government contract in which the taxpayer-plaintiff is neither a party to nor a beneficiary of the agreement," and that Dr. Sklaroff doesn't merit standing.

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[2] A Taxpayer-plaintiff must plead and prove that: (1)—the governmental action in question would otherwise go unchallenged; (2)—those directly affected are beneficially affected; (3)—judicial relief is appropriate; (4)—redress through other channels is unavailable; and (5)—no other party is better situated to assert the claim.

PM ignores Dr. Sklaroff's claims that he is challenging exercise of governmental power (i.e., the power to settle), that litigating is a form of "governmental authority or activity," and that he claims he is a third-party beneficiary of the MSA (*vide supra*).

Instead, PM argues that "members of the public are merely incidental beneficiaries of a government contract and have no actionable rights thereunder." In PM's view, "The interpretation and administration of a contract. . .is not an obligation placed on the general public or an emolument given to the exercise of governmental power. Governmental officials, not taxpaying members of the public, are charged with interpreting public contracts." Yet, none of these arguments or citations allow for **exclusive** control of this entire process by public officials, particularly when the document in-question is a court-approved document, not just a contract.

Predictably, PM argues Dr. Sklaroff is suing the "wrong party" to gain taxpayer standing, without citing a cogent reason why this conclusion is justified. That it cannot cite any statute that supports this restrictive view illustrates why it is a "reach." And that PM has not refuted any of the five, unqualified Biester criteria speaks to their being controlling.

B. The Complaint Should Not Be Dismissed Because The Claims It Seeks To Adjudicate Have Not Become Moot.

Inexplicably, PM applauded the lower court for having "correctly" concluded that Dr. Sklaroff's complaint was moot because Wawa had removed the Marlboro billboards. "The mootness doctrine requires that 'an actual controversy must be extant at all states of review, not merely at the time the complaint is filed." However, an otherwise moot case may nonetheless still be resolved by the court in one of three narrow instances: (1)—when the case involves questions of great public importance; (2)—when the conduct complained

of is capable of repetition yet avoiding review; or (3)—when a party to the controversy will suffer some detriment without the court's decision.

Previously, Dr. Sklaroff showed how this case meets all three of these criteria; thus, alleged mootness should be discounted under the current circumstances.

1. An Actual Case Or Controversy Remains "Live."

In this situation, however, the billboards returned, and were amplified by additional billboards of comparable content and funding (by PM) both in the CoP and elsewhere. Thus, empiric argument that the controversy persisted after May, 1999, was prescient. Therefore, it is uncanny that the lower court chose to ignore evidence of this conduct, choosing instead simply to reaffirm his order following filing of a motion to reconsider.

2. A Reasonable Expectation Persists That The Wrong Will Recur.

After the AG noted that Wawa had "reneged" and after the national nature of this conduct had been documented, the fact that the AG's jawboning failed to influence the behavior either of PM or of the retailer/distributor illustrates why such conduct not only can recur but, indeed, is undoubtedly continuing to occur. Thus, the AG's inaction causes damage. Even were this not the case, one could envision a scenario in which PM violates the MSA sporadically, ceasing after a filing, recurring thereafter. A fine and injunction are needed.

In a footnote, PM grudgingly noted the evidence that disproves its angelic self-portrayal, yet it refuses to acknowledge that it could be invoked to allege a pattern of conduct. And in another footnote, it is alleged that, unlike Dr. Sklaroff, plaintiffs in other cases asserted that the action at-issue could escape review in the future and that they could

suffer some detriment without immediate judicial action. Dr. Sklaroff indeed has made these charges.

The key public policy concern is whether PM can be trusted to abide by the gigantic MSA despite violations that already have occurred. It agreed to remove tobacco billboards because it agreed children who read them are more apt to smoke. By its own admission, therefore, its funding of Wawa ads will generate more tobacco-addicted children.

C. Dr. Sklaroff's Claims Under The UTPCPL Should Not Be Dismissed.

PM notes that Dr. Sklaroff didn't buy any Marlboro cigarettes, nor could he have suffered any damages as a result of having used this product. Yet, PM fails to note that he can use the UTPCPL as a Private Attorney General on behalf of the public, seek an appropriate injunction as a result, and promulgate allegations of fraud that suffice for such a claim.

1. Dr. Sklaroff Can Invoke UTPCPL As A Private Attorney General.

"The UTPCPL does not explicitly provide for representative, group or class actions," according to PM. As has been the TI's classic argument, PM argues that this would be impermissible, anyway, "because of the necessity of showing that each person in the class acted in reliance upon PM's alleged misrepresentations." The former argument is refuted by a recent action in California; the latter is refuted by the Engle Case in Florida.

A recent (4/3/2000) ruling in San Diego, California[3] noted that standing as a private-AG was readily and fully

[3] "Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." § 17200, *et seq.*[3]. Comparable statutes exist in

available under the "Business and Professions Code." Daniels *et al* v. Philip Morris, *et al*, [SDSC Case # 719446]. This could also be granted in the CoP.

2. Dr. Sklaroff Can Seek Injunction As A Private Attorney General.

PM argues that only the AG or a District Attorney may seek an injunction; it ignores the fact that Dr. Sklaroff has cited the UTPCPL as justification to function as a private-AG.

3. Dr. Sklaroff's Allegations Of Fraud Suffice For A UTPCPL Claim.

PM contends Dr. Sklaroff must allege (1) misrepresentation; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded; and (5) damages to the party defrauded as a proximate result. These specific conclusions can be drawn after review of the PM-Wawa contract, with particular regard to how billboards were to be used to promote the use of tobacco by children. Such data have been gleaned from PM's secret memos, when it promoted deceptive and confusing advertising and when it misrepresented tobacco as having benefits and qualities that it does not have. These criteria are already met in this matter, inasmuch as the potential for billboard ads to entice children to smoke served as the basis for PM to have agreed to foreswear their use (in the MSA). And specific examples of PM's youth promotion also meet these criteria, inasmuch as PM has admitted that any such youth-directed ads misrepresented youth's ability to decide to smoke; that inclusion in magazines or receipt by mail led them to be read; that the inappropriate goal was to get kids to smoke; that some kids would smoke as a result;

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the CoP, such as the UTPCPL (73 P.S. § 201-4) that authorizes the AG to seek injunctive relief to enjoin fraudulent trade practices.

and that kids would get sick (immediately or later) as a result of having smoked.

C. Dr. Sklaroff Attached Writings.

Documentation of PM's conduct was provided pictorially (with copies that had sufficient clarity to demonstrate its abhorrent conduct, both in the CoP and elsewhere in the U.S.), and the availability of videotape documentation of PM's false assertions was articulated.

D. The Record Should Be Supplemented By Information That Refutes The Alleged Mootness Of This Litigation.

Dr. Sklaroff attempted to supplement the record with documentation of PM's recidivism, but Judge Herron inexplicably denied this motion. Inasmuch as it *a priori* disproves mootness, such behavior reflects abuse of discretion that led to his drawing an erroneous conclusion of law (i.e., that the conduct had been limited to one remote period in May). Therefore, it should be included, with the opportunity to explain-it-away provided to PM.

VII. CONCLUSION

Judge Kelley concluded [***emphasis*** in the original document] regarding the MSA:

> The record in this case is absolutely devoid of ***any*** evidence establishing the damages suffered by the Commonwealth through its agencies, departments, commissions or divisions, ***and*** its 67 counties, ***and*** its various municipalities, cities, boroughs, townships, entities, instrumentalities and educational institutions. Thus, from this record, there is absolutely no way to determine the adequacy or appropriateness of the proposed settlement

> in this case. In the absence of ***any*** evidence to support this determination, the trial court was absolutely precluded from possessing the sufficient necessary information to permit an intelligent decision prior to accepting and endorsing settlement in this case.

These issues are explored in the Writ; the key point in this case is that the MSA intended to yield no further litigation against the TI. Extinguishing the rights of youth was to carry an enormous fiscal and operational benefit for the TI, including PM. And within a year, the "returns" have already been manifest; the CoP's AG did nothing to disturb the new power-balance that had been created. That's why the MSA is problematic, and that's why Dr. Sklaroff is merely applying it and documenting the response elicited from PM and the AG ("Stay away from our private deal!") a year after they pledged to adhere to it. Amazingly, the AG has arrogantly failed even to **pretend** to investigate these complaints.

Because the MSA has not achieved a "state specific finality" level of approval and, thus, because Dr. Sklaroff's efforts to remove the "Releasing Parties" clause persist unabated, Dr. Sklaroff is not precluded from suing PM under the MSA. Regardless of the seismic impact of Judge Kelly's Opinion, the fact remains that his step-by-step analysis of the MSA allows for the filing of litigation such as that being pursued in the instant matter. Only following exhaustion of all appeals, would it be appropriate for Dr. Sklaroff to be subject to the MSA's constraints. Indeed, although PM has released monies to the CoP, "State Specific Finality" includes "(3) . . .in the event of an Appeal, . . . [it] has become no longer subject to further Appeal (including, without limitation, review by the United States Supreme Court." [MSA, II (ss)] Thus, Dr. Sklaroff attempts to ensure PM abides by its professed desire to ban tobacco billboard ads. . .and thus encounters a buzz-saw.

That Dr. Sklaroff merits standing has been exhaustively demonstrated; many facets thereof remain unrefuted (e.g., meeting Biester), and other facets thereof have been misrepresented (e.g., the MSA being court-approved—not merely a contract—and the status afforded third-party beneficiaries being provided to Dr. Sklaroff). That this case is hardly moot has also been exhaustively documented, inclusive of materials that have inexplicably been excluded from the record. That Dr. Sklaroff can attain the status of a private-AG has been referenced, particularly because statute doesn't forbid his using it. That Dr. Sklaroff has pled the UTPCPL with particularity has been elucidated herein. That his motion to supplement the record should be honored has been demonstrated, simply because PM otherwise has the capacity to argue incorrectly that the case is moot. And that PM failed to respond to other carefully-parsed quotes is quite telling.

Judge Kelly also concluded that:

> The trial court may not place its judicial imprimatur on a proposed settlement and consent decrees, and order the entry of judgment thereon, where the record utterly fails to demonstrate that it is a just and fair resolution to the matter. This particularly so where the proposed settlement and consent decrees are of such a broad expanse, so absolutely preclude future claims and liability, and may never be altered or amended in any manner by the court.

Yet, this prescient opinion threatens to play-out in the instant case. As the AG invokes prosecutorial discretion to avoid pursuing MSA violations by PM, PM enjoys immunity. As PM avoids scrutiny by anyone else, it is empowered to ignore the MSA with abandon. And as the trial court blithely and blindly and consciously ignores data that disprove its faulty assumptions, probing PM's conduct is rightly transformed from moot to mandated.

The only way to "moot" this case is either for the AG to discharge his duty, or for PM to admit error and foreswear future misconduct. The MSA is admittedly fatally flawed, but the Settling Parties agreed to follow it, but neither has. Dr. Sklaroff is merely discharging his civic duty, maximizing efforts to maintain the public health; he would welcome others relieving him of this responsibility, but others seem disinclined to perform their duties.

For all the foregoing reasons, Dr. Sklaroff's Complaint should not be dismissed, in its entirety, with prejudice. Of course, Dr. Sklaroff respectfully requests leave to amend his Complaint should any facet thereof be viewed by the Court as insufficiently pled.

Respectfully submitted,

3. Supplementary Analyses

A. The Offset

Activists fear this offset will function as does a computer operating system: in the background, but in control of all identifiable processes. It undermines the public interest by requiring the Attorney General either to defend the Tobacco Industry defendant or to finance litigation outcome. Therefore, it prompts the Tobacco Industry to seek fiscal (rather than policy-oriented) concessions during settlement negotiations.

The Settling Parties cited to no precedent for how the offset provision was to be triggered and applied. Thus, an Internet-Search was initiated to discern whether reference to the word "offset" appeared in comparable legal documents. It was found to be a "General Business Term," used often within contexts comparable to this contract excerpt [Berchtold, IV.2.]: "The customer may offset payment only against claims that are undisputed or legally established."

Governmental regulations invoked this term when the monies involved had been generated in a comparable (if not identical) fashion. The Treasury Department defined an "administrative offset" when the Federal Government is required "to withhold or reduce certain Federal payments to satisfy the delinquent non-tax debts owed to the United States by the payee." Federal Register 63(81):23353-23359. Another cited an "IRS offset" (Scenario #2). Office of Child Support Enforcement. OCSE-AT-98-15.

Arizona's Wage Statute mandated "the employer cannot offset debts that are unrelated to employment" when "withholding wages." A.R.S., ¶ 23-351. The SEC uses "offset" as a tag in submission headers and defines it as "when the fee or part of the fee is paid with another." The EDGAR System. Sect. B (4.9.3). It may grant "Tax Offset Payments" when a contract is submitted to the SEC. SEC Form S-8 [4(a)].

None portrayed a scenario in which monies are paid to provide immunity without the need to write an insurance policy (a task that would necessitate acquiring and exercising a Certificate of Authority from the CoP Insurance Department) **as is contemplated by the Settling Parties.**

Application of this concept was explored with relation to Federal Indemnification of manufacturers of vaccines that, rarely, could cause severe allergic reactions. National Swine Flu Immunization Program of 1976. P.L. 94-380. Senate Report No. 94-1147 noted that the concept of immunizing manufacturers was unprecedented; thus, this program is amenable to comparison & contrast with that contemplated by the MSA. A subsequent American Medical Association Report[4] noted it had also proven fiscally successful.

The purpose of this program **contrasts** with that touted by the MSA's proponents; whereas the MSA omits an Admissions section that could simplify its interpretation, Congress articulated the lofty and specific goals of the Vaccine Immunization Program[5].

The fact that it was submitted for legislative approval **contrasts** with the MSA. Its detail **contrasts** with the vague terminology in the MSA's tenets.

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[4] The Policy Compendium (#H-440.929) cites Board of Trustees Report "QQ" (A-93) ("Update on the National Childhood Vaccine Injury Act of 1986") which notes the budget surplus.

[5] "To achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute, and administer the swine flu vaccine purchased and used in the swine flu program and to assure the availability of such vaccine in interstate commerce, it is necessary to protect such agencies, organizations, and individuals against liability for other than their own negligence to persons alleging personal injury or death arising out of the administration of such vaccine. . . .

"To provide such protection and to establish an orderly procedure for the prompt and equitable handling of claims by persons alleging such injury or death, it is necessary that an exclusive remedy for such claimants be provided against the United States because of its unique role in the initiation, planning and administration of the swine flu program. . . .

Honoring constitutional separation-of-powers considerations (during a public health epidemic) **contrasts** with the effort to achieve expeditious approval of the MSA (during a public funding compulsion). Its mandate that all such claims were to be asserted directly against the United States **contrasts** with the mandate in the MSA that the Tobacco Industry "reasonably defend" such litigation.

Its mandate that "any insurance premium amount which is included in the price of such procurement contract and which is refunded to the manufacturer under any retrospective, experienced-rating plan or similar rating plan shall, in turn, be refunded to the United States," **contrasts** with the absence of any such reporting requirement by the Tobacco Industry (to the Food and Drug Administration or, for that matter, to any regulatory entity) under the MSA.

Unlike the MSA, corporate beneficiaries of a government indemnification program were obligated to calculate its price and to ensure the government wasn't penalized as a result thereof. Thus, that government immunized vaccine manufacturers who were producing a product that would benefit the public health without offsetting any type of payment **contrasts** with the fact that the Attorney General did not submit evidence setting the value of (past, present and future) claims against the Tobacco Industry.

Spokespeople representing state government and the Tobacco Industry have publicly disagreed regarding the applicability of the offset to cases raised in Pittsburgh and Philadelphia. Because granting this Writ of Certiorari will predictably yield clarification of this problem, it should be granted, so as to satisfy both legal issues and public policy concerns.

References

American Medical Association Policy Compendium
#H-440.929 [Board of Trustees Report QQ (A-93)]

A.R.S.
Arizona's Wage Statute ¶ 23-351

Berchtold
General Terms of Business
http://www.berchtold.de/berchtold/2/agb.htm

The EDGAR System SEC Manual Sect. B (4.9.3)
http://edgar.stern.nyu.edu/sponsors/sec_manual/I-chap4b.pl.toc.html

The Debt Collection Improvement Act of 1996
Federal Register 681:23353-23359 (4/28/98)

National Swine Flu Immunization Program of 1976
P.L. 94-380

Office of Child Support Enforcement
OCSE-AT-98-15

Securities and Exchange Commission
Form S-8 [¶ 4(a)]
http://www.investquest.com/iz/a/ainn/fin/other/ainns801.txt

B. Other Potential Causes of Action

Dr. Sklaroff can articulate another cause-of-action based upon the MSA justifying a taxpayer suit.

It would be intended to prohibit settlement monies from being tax-deductible, quietly denying the TI a $40 billion windfall unless taxpayers revolt (as they did when Congress adopted com-parable legislation prior to the 1998 summer recess). [This law was disavowed by the bipartisan leadership (and President), and rescinded after Labor Day.]

Despite the fact that excise taxes don't cover non-Medicaid tobacco-related expenses, any effort to raise them would not occur because all monies raised by that mechanism would then trigger "a continuing dollar-for-dollar offset" against the annual payments by the Tobacco Industry to the states. [see Section X: "Effect of Federal Tobacco-Related Legislation"]. These are depicted in the MSA, thusly:

> ...(b) The offset described in subsection (a) shall apply only to that portion of Federal Funds, if any, that are either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control or enforcement).

Justification for such tax increases is invariably linked to implementation along the above-stated lines. The net effect of this phraseology to capitate payments if the Federal Government raises taxes.

It is quite plausible that, otherwise, Congress might wish to finance additional tobacco-related expenditures. Dr. Sklaroff, as a non-smoker and as a taxpayer, would want to maximize tax revenue collected from smokers for two reasons: to limit his own fiscal liability for smokers' self-inflicted damages and to decrease youth smoking (due to consequent total price increases). Thus, he would want to be able to litigate this issue.

Dr. Sklaroff has the legal right to seek relief on behalf of and/or generally applicable to the general public by filing generic litigation.

The Petitioners' Brief cited numerous causes of action—in Pennsylvania and throughout America—which could be and have been filed in Pennsylvania against the Tobacco Industry. Dr. Sklaroff could serve as the plaintiff in these cases, all of which have passed muster as causes-of-action. These cases have Legally Enforceable Interests that are also amenable to being prosecuted by other activists.

Possible future litigation exemplifying what they could legally now assert—but which could become problematic under the spell of the MSA—include the following:

If the Tobacco Industry tried to circumvent advertising restrictions (e.g., promoting a new cigarette brand that shares the name of a parent entity), Dr. Sklaroff could file an intervention comparable to the successful effort by a public interest plaintiff against "Joe Camel." Mangini v. R. J. Reynolds Tobacco Company, *et al.*, 875 P 2d 73 (Cal. 1994).

Dr. Sklaroff has provided healthcare to Pennsylvania's Medicaid, medically indigent and non-paying patients and, thus could file a case comparable to that of a hospital group. Allegheny General Hospital, *et al* v. Philip Morris, Inc., *et al.*, Court of Common Pleas of Allegheny County, Civil Division GD No. 98-018956 (1998).

Dr. Sklaroff has provided consultative support for the litigation filed against the use of mentholated cigarettes. Reverend Jesse Brown, *et al.* v. Philip Morris, Inc., *et al.*, U.S. District Court for the Eastern District of PA, Civil Action No. 98-5518.

He could provide scientific support for a suit filed by a group of smokers seeking cessation programs. Sweeney, *et al.* v. American Tobacco Company, *et al.*, Court of Common Pleas of Allegheny County, No. 98-16226. And this medical approach could easily be provided to a group of smokers of low-tar/low-nicotine cigarettes. McNamara, *et al.*, Court of Common Pleas of Montgomery County No 98-13501.

In such **non-hypothetical matters**, Tobacco Industry defendants have been unable to dislodge plaintiffs from pursuing actions Dr. Sklaroff could pursue. Causes of action pursued successfully in other states could also be invoked in Pennsylvania related, for example, to environmental tobacco smoke protection and divulging additives. Regarding the former, established literature suggests ETS causes cancer and heart disease; recent literature shows bartenders' lung function rapidly improves when their workplaces are smoke-free. Regarding the latter, established literature suggests that ingredients may enhance carcinogenicity, overall toxicity, and the risk of residential fires; recent literature suggests the Tobacco Industry knew in 1961 that such biologically active materials are cancer-causing and -promoting.

Faulty facets of the MSA could be enjoined, such as advertising promoted by the Tobacco Industry against youth smoking, now shown to have been counterproductive (as the Tobacco Industry intended).

Anti-tobacco activism has roots in the nicotine addiction literature, also yielding a potential source of litigation. Extensive research into the diagnosis and treatment of nicotine addiction is urgent (as per CDC recommendations), inasmuch as it is vital that all Americans learn that their health is immediately benefited following initiation of smoking behavior. Youth, in particular, must learn that smoking affects both longevity (with consequences experienced decades in the future) and current quality-of-life concerns. All Americans must learn that they are not invariably doomed if they smoked beyond their teens.

Antitrust suits could be filed against the Tobacco Industry—comparable both to the March 11, 2000 filing by RJR-Nabisco against Philip Morris and to others filed by smaller tobacco manufacturers—that the MSA would block the Attorney General from pursuing.

Thus, parents, citizens, taxpayers, governments, and health-care providers must be able to hold the Tobacco Industry (Public Health Enemy #1) accountable for its deeds.

C. Biester

Dr. Sklaroff warrants standing under the Biester taxpayer exception, even were his interests not substantial, immediate or direct. Under this exception, the taxpayer must show: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of expenditures beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no existence of other persons better situated to assert the claim. Biester, 487 Pa. at 443, 409 A.2d at 851 (1979). The relevant public policy is:

> The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. Such litigation allows the courts, within the framework of traditional notions of "standing," to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts. [Biester, 409 A.2d at 851 n.5.]

The Biester exception has been broadly applied. Taxpayers gained standing to challenge a new compensation law adopted by and for the state legislature because both no administrative agency was extant that was empowered to provide relief, and because legislators were felt "unlikely to provide a meaningful mechanism for redress." Consumer Party of Pennsylvania v. Com. of Pennsylvania, 507 A.2d 323 (Pa. 1986). A taxpayer gained standing to challenge two judicial vacancies appearing on the ballot in the 1988 general elections because "the only persons better situated to maintain this action are the respondents" who were deemed "directly and beneficially affected" and "who did not choose to institute legal action." Sprague v. Casey, 550 A.2d 184 (Pa. 1988).

A taxpayer gained standing to challenge an increase in the police commissioner's pension because no "prior, contemporaneous or even post notice was provided to Rizzo or any other taxpayer." Rizzo v. City of Philadelphia, 528 A.2d 1128 (Pa.Cmwlth. 1990). The plaintiffs' concerns related more to exertion of public policy than to enforcement of tax law.

Concerns of a more "fiscal" nature (an appropriations bill and a user fee) have also been successful. Taxpayers gained standing "because the very individuals who enacted such legislation are not going to be inclined to challenge the constitutionality of the process by which Act 1A was enacted." League of Women Voters of PA *et al* v. Commonwealth of PA *et al*. 692 A.2d 263 (Pa.Cmwlth. 1997). A trade association gained standing because at least one of its members would pay an impact fee, a tax. Building Industry Ass'n v. Manheim Township. 710 A.2d 141 (Pa.Cmwlth. 1998).

Recently, Commonwealth Court sustained the view that "taxpayers or organizations that represent Philadelphia taxpayers" merit standing during review of billboards at zoning hearings. Society Created to Reduce Urban Blight (SCRUB) *et al.* v. Zoning Board of Adjustment of the City of Philadelphia *et al*. (Filed 4/5/99). SCRUB's concerns are not limited to fiscal issues, a posture similar to that of Dr. Sklaroff.

Unaddressed but recognized in the SCRUB case were two additional reasons for granting standing: "zone of interest" and "private Attorney General." The former cited Ken R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1966) & Jefferson Bank v. Newton Associates, 686 A.2d. 834 (Pa. Superior Ct. 1966), and the latter cited Jones v. Muir, 511 Pa. 535 A.2d 855 (1986). The latter was defined as a party "who may not carry a substantial, direct or immediate interest in the subject matter of the litigation may be conferred with standing because he shares a common interest with citizens or taxpayers in general."

Regarding "Private Attorneys General," a recent (4/3/2000) ruling in San Diego, California is on-point. In Daniels *et al* v. Philip Morris, *et al*, [SDSC Case No. 719446], class certification was denied in an action intended to eliminate advertising and promotion of cigarettes that unlawfully encourages minors to smoke.

California citizens now have standing under the "Business and Professions Code," which defines "Unfair Competition" as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Comparable statutes exist in Pennsylvania.

For example, the UTPCPL (73 P.S. § 201-4) authorizes the Attorney General to seek injunctive relief to enjoin fraudulent trade practices that violate the statute.

Judge Ronald S. Prager's rationale:

> [T]he relief sought by Plaintiffs as identified by way of a review of the prayer for relief in the operative second amended complaint, for injunctive relief, resolution of funds conferred and disgorgement of ill-gotten gains, is readily and fully potentially available under the provisions of B & P § 17200, *et seq*. . . .Thus, an effective form of class-wide relief is available to fully compensate Plaintiffs in the event they prevail in the absence of class certification. [emphasis added]

D. Cursory Analysis of the MSA

The substance of the MSA has not been subject to even the most superficial level of analysis merited by a contract of far less medical, economic, societal and legal significance. Protecting the interests of absent class members (minors, incompetents and incapacitants), the court must independently and objectively analyze the evidence and circumstances before it, in order to determine whether implementing a settlement is in the best interest of those whose claims will be extinguished. Newberg on Class Actions, section 11.40 (1985).

Neither this court nor any other in America addressed (let alone accomplished) this basic task. Allegheny County's Brief (pages 29-30) also detailed two ways that the MSA empowers the Attorney General to aid the Tobacco Industry in limiting future litigation.

The Opinion also failed to scrutinize the MSA to the degree necessary to "reach" assessment of such considerations as these: First, the CoP has retained and/or claimed the right to approve any future settlement which others might reach in their own right; they have potentially interposed a previously non-existent defense to the lawful pursuit of collective claims. Second, the CoP has contractually agreed not to assist or encourage, directly or indirectly, "any challenge to the [MSA] or any Consent Decree by any other person, and will support the integrity and enforcement of the terms of the Agreement and the Consent Decrees."

Also, the Opinion failed to address how the MSA obviates litigation such as by abridging citizens' rights to report wrongdoing by invoking centuries-old *qui tam* law. And it did not examine additional issues detailed throughout this writ that flesh-out how the Court responsible for administering the MSA envisions how it will discharge this duty.

This task was noted specifically during the MSA Hearings: "The Court in reviewing the consent decree looks at issues of fairness, reasonableness and adequacy for all the parties involved." [N. T. 1/8/99, page 18]. Yet, nowhere in the Opinion is it stated that these fundamental criteria were applied through independent review of the MSA; analysis was limited to specific concerns raised by the petitioners.

The Tobacco Industry Brief [page 9] unwittingly provided a key citation, however, the emphasis of which can be reformulated (by noting the presence of the qualifier "may"] to relegate this concern, properly, **below** that of determining standing: "An application for intervention **may** [not "must"] be refused if 'the intervention will unduly delay, embarrass or prejudice. . .adjudication of the rights of the parties,' " [Pa.R.C.P. 2329(3)]

¶ II (pp) must be struck from the MSA.

The Immunity Clause [paragraph II (pp)] clearly is overly-broad, unconstitutional, inconsistent with public policy and *ultra vires*. Yet, the AG has refused to explain why he refuses to offer a stipulation foreswearing his admitted inability to halt such suits.

He also failed to confront the possibility that future litigation could activate it. Thus, the AG lacks authority to grant immunity to the TI for a settlement of past, present and future claims when he refuses to interpret its basic tenets contemporaneously.

¶ XII (b) must be struck from the MSA.

Future claims could destroy whatever benefit the CoP stands to receive through the MSA, rendering it merit-less as a source of monetary recovery; private suits have sparked punitive damage awards that could occur if "other persons" (including organizations) to win public interest litigation.

This money would be subject to the offset. This practical expectation is justified, noting the evolutionary nature of jurisprudence.

The Attorney General has abdicated his responsibility to protect the citizenry under the above-cited consumer laws from past and future harm by the Tobacco Industry of unknown magnitude. The Attorney General does not have the constitutional discretion to ignore the will of the legislature and cede rights, powers and responsibilities on behalf of the CoP for at least the next quarter-century in exchange for a monetary settlement (of admittedly-variable and candidly-unknown value) and presumed good conduct (that he won't enforce). Attorney General is not "licensed" to "sell" liability insurance protection.

The MSA allowed the Tobacco Industry to place a fiscal windfall before state governmental officials, without limits on its appropriation. That these monies had been generated on behalf of youth—ostensibly, recompense for Medicaid expenses—was subordinated to efforts to fund pet projects, ranging from health-related research to filling potholes. Into this environment stepped activists, steeped in decades-long, heart-felt battles against the Tobacco Industry and those it funded; suddenly, a new "adversary" arose—state government—potentially ensconced in this role in perpetuity. Activists who would potentially obtain support chose to seek same, rather than to confront implications of receiving "The Devil's Money." The counter-argument, of course, is that the Tobacco Industry must pay for its legacy of disease, disability and death by redirecting its monies toward eradication of preventable illness (even if recipients can delink this work from tobacco control programs).

(3)

No. 99-1852

Supreme Court, U.S.
FILED
JUN 19 2000
CLERK

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
By D. MICHAEL FISHER, in his OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF FOR RESPONDENTS PHILIP MORRIS INCORPORATED, BROWN & WILLIAMSON TOBACCO CORPORATION (INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY, INC.), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, UNITED STATES TOBACCO COMPANY, THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., THE TOBACCO INSTITUTE, INC. AND HILL & KNOWLTON, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all of the Pennsylvania state courts' decisions rested on "adequate and independent" state law principles.

2. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has failed to satisfy the criteria for standing under Article III of the United States Constitution.

3. Whether this Court lacks jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has failed to preserve a federal issue in the Pennsylvania state courts, and failed to raise a federal issue in the petition.

4. Whether the petition presents any issue worthy of review by this Court.

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENTS

The named parties to the proceeding in the Supreme Court of Pennsylvania included:

Robert B. Sklaroff (Appellant/Petitioner for Intervention)

The Commonwealth of Pennsylvania, by D. Michael Fisher, in his official capacity as Attorney General of the Commonwealth of Pennsylvania (Appellee/Plaintiff)

Philip Morris Incorporated; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, p.l.c.; The American Tobacco Company, Inc., c/o Brown & Williamson Tobacco Corporation; Lorillard Tobacco Company; Liggett Group Inc.; United States Tobacco Company; The Tobacco Institute, Inc.; The Council for Tobacco Research-U.S.A., Inc.; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc. (Respondents/Defendants)

The following Respondent companies are joining in this opposition:

Philip Morris Incorporated
Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company, Inc.)
R.J. Reynolds Tobacco Company
Lorillard Tobacco Company
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.

The Tobacco Institute, Inc.
Hill & Knowlton, Inc.

Pursuant to Rule 29.6 of the Supreme Court Rules, the following statements identify the corporate parents and all publicly held companies owning ten (10) percent or more of the voting stock of each corporate Respondent:

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company, Inc.) has the following parent corporations:

B.A.T. Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.
(formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. has no parent corporations. There are no publicly held companies that own 10% or more of The Tobacco Institute, Inc.'s stock.

Respondent Hill & Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP Group International Holdings, Inc.
WPPIH Two, Inc.
WPP Luxembuorg S.ARL
WPP Group plc
Ogilvy Group Inc.
J. Walter Thompson Company

WPP Group plc is the only publicly held company that owns 10% or more of Hill & Knowlton, Inc.'s stock.

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COUNTER-STATEMENT OF THE CASE

Respondents Philip Morris Incorporated, Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company, Inc.), R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, United States Tobacco Company, The Council for Tobacco Research-U.S.A., Inc., The Tobacco Institute, Inc., and Hill & Knowlton, Inc. (collectively, "Respondents") oppose the frivolous petition of Dr. Robert B. Sklaroff ("Sklaroff") to this Court for a writ of certiorari to the Supreme Court of Pennsylvania. This petition is part of Sklaroff's continuing assault on the historic settlement agreement between various manufacturers of tobacco products ("tobacco manufacturers") and the attorneys general of 46 states, the District of Columbia, and five U.S. territories. Courts in all 52 jurisdictions have approved this agreement, and 49 jurisdictions—including the Commonwealth of Pennsylvania (the "Commonwealth")—have already begun receiving payments from the tobacco manufacturers. Nonetheless, despite having been told repeatedly by the Pennsylvania courts that he has no standing to bring such an action, Sklaroff continues to challenge this agreement, wasting substantial time and resources of the Commonwealth and Respondents. This Court should end Sklaroff's effort to disrupt the national settlement agreement and deny his petition on the grounds that: (1) the Pennsylvania courts' decisions were based on adequate and independent state grounds; (2) Sklaroff lacks standing; (3) no federal issue is properly presented for review by this Court; and (4) Sklaroff's petition raises no issue worthy of this Court's review.

A. The Master Settlement Agreement between the State Attorneys General and the Tobacco Manufacturers

On April 23, 1997, the Attorney General of the Commonwealth filed a lawsuit in the Court of Common Pleas of

Philadelphia County against a number of tobacco manufacturers[1] seeking damages, recovery of Medicaid and other medical payments and injunctive relief. *See Commonwealth of Pennsylvania v. Philip Morris, Inc.*, No. 2443 (Philadelphia County Ct. C.P. April 23, 1997). The Commonwealth's lawsuit was one of a series of lawsuits filed by other states, the District of Columbia and several U.S. territories. Shortly after the filing of these cases, the various plaintiffs and tobacco manufacturers entered comprehensive settlement negotiations. These negotiations concluded on November 23, 1998, when 46 states, including the Commonwealth, the District of Columbia and five U.S. territories, agreed to the Nationwide Master Settlement Agreement (the "MSA").

Pursuant to the MSA, the tobacco manufacturers agreed to pay the Commonwealth of Pennsylvania $11.26 billion over the next 25 years, and an additional $500 million per year in perpetuity thereafter. The tobacco manufacturers also agreed to numerous restrictions that otherwise could not have been imposed by court order. The Commonwealth has already begun receiving payments from the tobacco manufacturers under the MSA.

B. The Pennsylvania Court of Common Pleas' Rejection of Sklaroff's Petition to Intervene

On December 11, 1998, the Commonwealth and the tobacco manufacturers filed Joint Motions with the Court of Common Pleas to approve the settlement agreements and dismiss the lawsuit. However, before the trial court could rule on the motions,

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[1] Specifically, the Commonwealth sued the following parties: Philip Morris Incorporated; R. J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, p.l.c., The American Tobacco Company, Inc.; Lorillard Tobacco Company; Liggett Group, Inc.; United States Tobacco Company; The Tobacco Institute Inc.; The Council for Tobacco Research-USA, Inc.; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc.

a number of anti-tobacco organizations and individuals, including Sklaroff (collectively, the "Activists"), together with a group of not-for-profit hospitals and the County of Allegheny, Pennsylvania, petitioned to intervene in the Commonwealth's case. The Activists, although not opposing the negotiation or conclusion of the MSA, challenged the MSA's release and offset provisions, which the petitioners asserted might impair their right to bring legal actions against the tobacco manufacturers in the future. At the time of the intervention petitions, the Activists had not instituted any suit against the tobacco manufacturers.

Ultimately, on January 13, 1999, after considering all of the arguments and the relevant Pennsylvania laws governing standing to intervene and ripeness, Judge John W. Herron of the Court of Common Pleas of Philadelphia County, Pennsylvania, entered orders approving the MSA and denying all the petitions to intervene (with the exception of the petition of a particular health care maintenance organization, which was denied later). The court concluded that the proposed intervenors failed to satisfy the criteria for intervention set forth in Pennsylvania Rules of Civil Procedure 2326 through 2329.[2]

Specifically, the court dismissed the Activists' challenge to the release provision of the MSA pursuant to the Pennsylvania Supreme Court's opinion in *Pennsylvania Crime Commission Subpoena*, 309 A.2d 401 (Pa. 1973). In that case, the Pennsylvania Supreme Court denied certain police officers' petitions to intervene and challenge the subpoenaing of disciplinary records maintained by the Police Commissioner for the City of Philadelphia because the officers' only interest was the possibility that the subpoenaed information could be used against them in a future action. *Pennsylvania Crime Commission Subpoena*, 309

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[2] Pennsylvania Rule of Civil Procedure 2327 provides that intervention should be permitted if: "(4) the determination of such action may affect any enforceable interest of such person whether or not he may be bound by a judgment in the action." Pa.R.C.P. 2327.

A.2d at 405. In rejecting the Activists' petition to intervene, the Court of Common Pleas found that the Activists' challenge to the MSA's release provision, like the petitions to intervene in *Pennsylvania Crime Commission Subpoena*, raised "anticipatory concerns about the effect of a third party's action (*i.e.*, the MSA) on a future action that [the intervention petitioners] might bring." C.P. Op., Appendix A to Petition at 31. Because the effect of the MSA provision "if any . . . [could not] be determined except in the context of that future [action the Activists might bring]," the court concluded that the Activists' challenge to the release provision failed to present "an actual case or controversy – a legally enforceable interest – ripe for disposition." *Id.* Accordingly, the Activists' challenge to the release provision failed to satisfy Pennsylvania Rule of Civil Procedure 2327.

Similarly, the Court of Common Pleas concluded that the Activists lacked standing to intervene and standing to challenge the MSA's indemnity provision. The court found that the Activists failed to satisfy the Pennsylvania Supreme Court's standing requirements set forth in *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992), which requires:

> [g]enerally, in order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. To surpass that common interest, the interests must be substantial, direct, and immediate.

Sierra Club, 605 A.2d at 310. In particular, the court concluded that the Activists "failed to establish either direct or immediate harm" caused by the indemnification provision of the MSA. C.P. Op., Appendix A to Petition at 37. Accordingly, the petitions were denied.

C. The Pennsylvania Appellate Courts' Rejection of Sklaroff's Appeals

While most of the Activists appealed to the Pennsylvania Commonwealth Court, all of the Activists subsequently with-

drew their appeals prior to the Commonwealth Court's decision – except Sklaroff. *See* Opinions of the Commonwealth Court, attached as Appendix B to Petition. On August 10, 1999, the Commonwealth Court issued an opinion, *en banc*, with one dissent, affirming the decision of the Court of Common Pleas, and holding that Sklaroff failed to satisfy the standing requirement for intervention under Pennsylvania law. Specifically, the Commonwealth Court held that Sklaroff sought "to represent the public interest common to all citizens," and that such interest was "insufficient to confer standing" to intervene under the Pennsylvania Supreme Court's holding in *Sierra Club v. Hartman*, *supra*. *See* Appendix B to Petition at 63-64. The Commonwealth Court's opinion did not address any federal issues.

Undeterred, Sklaroff petitioned the Supreme Court of Pennsylvania for review of the Commonwealth Court's opinion. In his request for review, Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly. The Pennsylvania Supreme Court summarily dismissed Sklaroff's petition on December 20, 1999. Sklaroff has now petitioned this Court for the issuance of a writ of certiorari to the Pennsylvania Supreme Court.

D. Sklaroff's Petition to this Court

In his petition, Sklaroff raises several meritless and irrelevant arguments premised almost exclusively on interpretations of Pennsylvania state law. First, Sklaroff asserts that he is entitled, pursuant to Pennsylvania law, to intervene and challenge the adoption of the MSA as a "citizen, taxpayer, father, activist, physician, private [attorney general] and litigant." Petition at 17. Second, Sklaroff asserts that his subsequent lawsuit against Philip Morris Incorporated, which is completely separate from this case and is not a part of the record here, should give Sklaroff standing. Petition at 23-24. And finally, Sklaroff argues that granting his petition would yield the "required judicial review" of the MSA. Petition at 24-30. None of these grounds justifies issuing a writ of certiorari in this case.

SUMMARY OF ARGUMENTS

This Court should not grant a writ of certiorari in this matter for the following reasons. First, the Pennsylvania courts' decisions that are the subject of Sklaroff's petition turned on adequate and independent state grounds. Second, Sklaroff still has not alleged the requisite standing to bring this petition under Article III of the United States Constitution. Third, Sklaroff's petition does not raise a federal issue that has been properly preserved for review by this Court. Finally, Sklaroff's petition raises no issue worthy of this Court's review. Accordingly, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

I. ALL ISSUES RAISED BY SKLAROFF WERE DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND ARE THEREFORE NOT SUBJECT TO THIS COURT'S JURISDICTION

This Court lacks jurisdiction to issue a writ of certiorari in this case because the Pennsylvania courts' orders denying Sklaroff standing to intervene were based on adequate and independent state grounds. From the time of its formation, this Court has adhered to the principle that "it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("in the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional"). As explained by the *Pitcairn* Court, "[this Court's] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.*, 324 U.S. at 125-126. Consequently, this Court will review opinions of a state court only when the "state court decision fairly appears to rest primarily on federal law, or [appears] to be interwoven with the federal law, and when the adequacy and independence of any possible state

law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

The Pennsylvania courts denied Sklaroff's petition to intervene on adequate and independent state grounds. As stated above, the Court of Common Pleas dismissed Sklaroff's petition because he failed to satisfy the standard for intervention under Pennsylvania Rule of Civil Procedure 2327 and otherwise lacked standing under the Pennsylvania Supreme Court's opinions in *Pennsylvania Crime Commission Subpoena* and *Sierra Club*. *See* C.P. Op., Appendix A to Petition at 31-37. The Commonwealth Court, in affirming the opinion of the Court of Common Pleas *en banc*, with one dissent, agreed that Sklaroff lacked standing to intervene under the standard set forth in the *Sierra Club* opinion. *See* Appendix B to Petition at 62-63. Finally, upon consideration of the above record, the Pennsylvania Supreme Court, in a summary order, denied Sklaroff's petition for review of the Commonwealth Court's order and allowed the lower courts' application of Pennsylvania law to stand. Appendix C to Petition.

These decisions by the Pennsylvania state courts did not implicate federal law. The Pennsylvania courts applied the Pennsylvania Rules of Civil Procedure, which are clearly distinct from the federal rules. Furthermore, it is well recognized that Pennsylvania state law standing requirements are independent of federal standing jurisprudence. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("the state courts are not bound to adhere to federal standing requirements"). Accordingly, the state courts' opinions were based on adequate and independent state grounds, and this Court has no jurisdiction to review such opinions.

II. SKLAROFF DOES NOT HAVE STANDING TO OBTAIN REVIEW BY THIS COURT

Sklaroff's petition fails to establish that he has standing to challenge the MSA and consequently fails to present this Court with a "case or controversy" upon which jurisdiction may rest. At an irreducible minimum, Article III of the United States Constitution requires the party who invokes a federal court's authority to "show that he personally has suffered some actual or threatened injury." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This "injury in fact" must be "concrete and particularized and actual or imminent, not conjecture or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must also be "fairly . . . traced to the challenged action" and "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). These criteria ensure that the "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., et al.*, 454 U.S. 464, 472 (1982).

In applying these Article III standing criteria, this Court has adhered to the basic principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Valley Forge Christian College*, 454 U.S. at 474. "This Court has repeatedly rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law . . .'" *Id.*, 454 U.S. at 482 (*quoting Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

It is plain from the record before this Court that Sklaroff has no standing to prosecute his petition. Sklaroff fails to assert any actual, concrete injury caused by either the MSA or the inability

to intervene in the Commonwealth's lawsuit against the tobacco manufacturers. Instead, Sklaroff asserts only that "[he] has an interest in the outcome of the suit that surpasses the common interest of all citizens *in procuring obedience to the law*, but which is asserted in the present/future interest." Petition at 17 (emphasis added). This interest in "procuring obedience to the law" is exactly the type of claim that this Court has repeatedly rejected – a claim which amounts to "little more than [an] attempt[] 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Flast v. Cohen*, 392 U.S. 83, 106 (1968). Like the public interest group that this Court held to have no standing in *Valley Forge Christian College*, Sklaroff has asserted no injury other than "the psychological consequence . . . [of] observation of conduct with which one disagrees." *See Valley Forge Christian College*, 454 U.S. at 485. Accordingly, this Court should deny Sklaroff's petition for certiorari, as Sklaroff has failed to demonstrate that he has standing under Article III of the United States Constitution.

III. SKLAROFF'S PETITION FAILS TO RAISE A FEDERAL ISSUE

This Court should not issue a writ of certiorari because a federal issue is not properly before this Court. This Court is specifically empowered to review only "final judgments or decrees rendered by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257. Except in "very rare circumstances," this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C.

§ 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing writ of certiorari where petitioner, although raising certain due process arguments before the Alabama Supreme Court, failed to raise the due process challenge contained in the petition). "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (*citing Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983)).

According to the record presented in the petition, Sklaroff did not properly present a federal issue to the Pennsylvania state courts. The Pennsylvania courts failed to pass on any federal issue, and dismissed Sklaroff's intervention petition on state law grounds. Moreover, Sklaroff's petition fails to demonstrate that a federal issue was nonetheless properly raised in the courts below, as is his burden. In fact, Sklaroff's petition to this Court centers almost exclusively on the state law principles applied by the lower courts. *See* Petition at 15, 17-21. While Sklaroff poses the conclusory and unsupported assertion that "[b]locking Dr. Sklaroff and the Activists from intervening denies them due process (under the 1st, 5th and 14th Amendments) and equal protection (under the 14th Amendment and the PA Constitution's Declarations of Rights)," Petition at 23, he fails to explain how any of these federal constitutional provisions are implicated by the state courts' rulings, or whether the issues were even preserved in the state courts.[3] Accordingly, as Sklaroff has failed

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[3] In fact, in the very next sentence of his petition, Sklaroff elaborates only on the provisions of the Declaration of Rights in the Pennsylvania Constitution and provides no discussion of the federal constitutional provisions.

to raise a federal issue in his petition, or to allege that a federal issue was preserved in the state courts below, this Court should not issue a writ of certiorari under 28 U.S.C. § 1257.

IV. SKLAROFF'S PETITION DOES NOT RAISE AN ISSUE WORTHY OF REVIEW BY THIS COURT

Finally, in addition to its constitutional and statutory deficiencies, Sklaroff's petition fails to raise any issue of substance worthy of this Court's review. Certainly, none of the reasons for review set forth in Rule 10 of the Rules of the Supreme Court apply to his petition. *See* Sup. Ct. R. 10. Accordingly, this Court should deny Sklaroff's petition.

CONCLUSION

For all of the foregoing reasons, this Court should deny Sklaroff's petition.

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No. 99-1852

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In The
Supreme Court of The United States

ROBERT B. SKLAROFF, M.D.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA BY MICHAEL FISHER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, et al.,

Respondents.

On Petition for Writ of Certiorari
From The Supreme Court of Pennsylvania

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QUESTIONS PRESENTED

1. Where the decisions of the Philadelphia Court of Common Pleas of Philadelphia and the Commonwealth Court of Pennsylvania *en banc*, denying the non-party Petitioner's attempt to intervene in this case post-settlement, were based strictly on adequate and independent state grounds, i.e., applying settled Pennsylvania law that Petitioner had no standing to intervene and failed to satisfy the requirements for intervention -- and no federal issues were raised in or decided by either court -- does this Court have jurisdiction to review those decisions?

2. Where the trial court denied Petitioner's post-settlement Petition to Intervene, finding: that Petitioner had no standing to intervene; that his claims were speculative and not ripe; that he did not have any legally enforceable interest that would justify intervention under Pa. R. C. P. 2327; and that intervention would unduly prejudice the resolution of the litigation and the parties under Pa. R.C. P. 2329; and where the decision was affirmed and adopted in its entirety by the Commonwealth Court of Pennsylvania *en banc*, which also denied reconsideration *en banc*, and further review was denied by the Supreme Court of Pennsylvania, is there any basis for this Court to engage in further review under the abuse of discretion standard governing non-party intervention under Pennsylvania law?

3. Where Petitioner failed to satisfy any of the prerequisites for non-party intervention under Pennsylvania law, has received full consideration and review by the Pennsylvania trial and appellate courts, and has not established or even raised any of the considerations in Supreme Court Rule 10 for granting a Writ of Certiorari, should this Court undertake further review?

4. Where Pennsylvania law renders petitions to intervene moot once the underlying lawsuit is terminated such that there is no longer any case or controversy in which to intervene, and this lawsuit was dismissed with prejudice on January 13, 1999, in conjunction with the parties' settlement of the case, is there any justiciable issue remaining for this Court to review?

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BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. COUNTER-STATEMENT OF BASIS FOR JURISDICTION

There is no basis for subject matter jurisdiction in this Court. The decisions below involved exclusively state law questions concerning standing to intervene post-settlement, and the requirements to intervene under Pennsylvania Rules of Civil Procedure. Despite Petitioner's belated attempt to manufacture a federal question in the later stages of his appeal, no court in this case ever addressed or ruled on any federal question.

B. COUNTER-STATEMENT OF THE CASE

Petitioner Robert Sklaroff, M.D., ("Sklaroff") sought to intervene, post-settlement and without standing or legally enforceable interest, in the Commonwealth of Pennsylvania's lawsuit against the tobacco industry. Sklaroff's post-settlement Petition to Intervene presented a straightforward application of the Pennsylvania Rules of Civil Procedure governing non-party intervention, and the Pennsylvania case law applying those Rules. Accordingly, Sklaroff's post-settlement Petition to Intervene was denied by the Trial Court for lack of standing and lack of merit. That decision was affirmed, *en banc,* by the Commonwealth Court of Pennsylvania, which adopted the Trial Court's Opinion in its entirety. Subsequently, the Supreme Court of Pennsylvania denied Sklaroff's Petition for Review.

On November 23, 1998, the underlying litigation, i.e., *Commonwealth of Pennsylvania v. Philip Morris, et al.*, then-pending in the Court of Common Pleas of Philadelphia County, was settled among the parties. At that time, the Commonwealth of Pennsylvania, along with 45 States that had not previously settled tobacco litigation, entered into a historic Master Settlement Agreement (MSA) and a parallel Smokeless Tobacco Master Settlement Agreement (STMSA), settling the states' litigation against the tobacco industry. The settlement requires the tobacco industry to pay the settling states $206 billion over 25 years, and requires dramatic nationwide changes in the way the tobacco companies do business, which will reduce teenage smoking and result in the considerable savings of lives and reduction of tobacco-related disease.[1]

The settlement of the Commonwealth's underlying lawsuit provides that the tobacco defendants will pay the Commonwealth $11.26 billion over the next 25 years with additional potential payments in excess of $500 million per year into perpetuity thereafter -- easily the largest litigation recovery in Pennsylvania history. In addition, the settlement calls for sweeping injunctive relief designed to protect the citizens of Pennsylvania from the harms caused by tobacco use. This relief, which goes far beyond that which a court would have the power to grant, when coupled with the public health, youth smoking cessation, and medical research programs contemplated by the settlement, will by all accounts produce significant results in the savings of lives and reduction of disease for millions of Pennsylvanians. In short, the

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[1] All trial and appellate courts which have reviewed and considered the *identical* MSA in the 46 States where similar State tobacco cases were pending, have *unanimously* approved the MSA or affirmed its approval by the trial judge. No petition to intervene to block the settlement has been granted by any court at any level.

settlement is potentially the most beneficial litigation resolution in Pennsylvania history.

Nevertheless, following the announcement of the settlement and without legal basis or standing, Sklaroff, who in his prior Briefs has proclaimed himself to be the "last anti-smoking activist who remains erect in America", filed a petition to intervene in the Commonwealth's litigation for the stated purpose of defeating the MSA, simply because *he*, a stranger to the litigation, wanted to change it.[2]

The trial court (Judge John Herron of the Court of Common Pleas of Philadelphia County), by Order dated January 13, 1999, properly denied Sklaroff's Petition to Intervene, concluding that (1) Sklaroff has no standing to intervene, post-settlement, in the Commonwealth's litigation, (2) Sklaroff could not satisfy any of the requisites for intervention as set forth in Pa. R.C.P. 2327 and 2329, and (3) the post-settlement intervention would be unduly prejudicial to the parties and to the resolution of their lawsuit (Pa. R.C.P. 2329). The Commonwealth Court of Pennsylvania affirmed *en banc*, adopting the trial Court's Opinion in its entirety, and denied Sklaroff's Petition for Reconsideration. The Supreme Court of Pennsylvania thereafter denied Sklaroff's Petition for Review.

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[2] Sklaroff has previously been sanctioned for proceeding with frivolous litigation at both the trial and appellate levels. *See Robert B. Sklaroff M.D. v. Allegheny Health Education Research Foundation, et al.*, 1996 W.L. 665519 (E.D. Pa. Nov. 12, 1996), *aff'd without opinion*, 118 F.3d 1578 (3d Cir. 1997), sanctioning Sklaroff in the amount of $146,393.24 in attorneys' fees and costs for bringing and proceeding with "frivolous" litigation in the trial court, and 1998 W.L. 47376 (E.D.Pa.), Memorandum Opinion of February 3, 1998 sanctioning Sklaroff in the amount of $31,311.85 for proceeding with a "frivolous" appeal in the Third Circuit Court of Appeals.

C. REASONS TO DENY THE PETITION

Sklaroff's Petition for Writ of Certiorari should be dismissed or denied because:

- Pennsylvania Courts have decided this case on adequate and independent state grounds, apart from any frivolous theoretical federal issue that the Petitioner is now trying to concoct (without delineation, authority or support), and therefore this Court has no jurisdiction to hear this case (*see Michigan v. Long*, 463 U.S. 1032 (1983));

- The Petition is moot under Pennsylvania law, since putative intervenor Sklaroff is seeking to intervene in the underlying action that was dismissed with prejudice by the trial court's Order dated January 13, 1999 (Sklaroff did not appeal from the dismissal). Accordingly, under well-settled Pennsylvania law and procedure, there is no pending case or controversy in which to intervene (*Richards v. Trimbur*, 374 Pa. Super. 352, 543 A.2d 116 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989));

- The Petition for Review does not present an issue warranting discretionary review by this Court because, as found after full consideration and review by the Pennsylvania trial and appellate courts:

  a. Sklaroff's post-settlement petition to intervene in the underlying litigation is without legal basis or merit; and

b. The trial Court properly applied Pennsylvania rules and law governing non-party intervention.

- Sklaroff does not even attempt to advance any appropriate reason why this Court should grant review, such as conflicts with decisions of this Court or of Federal Courts of Appeals, or conflicts with Courts of last resort in other states on any federal question, and does not identify any federal question decided or addressed below.

1. The Case Was Decided On Adequate and Independent State Grounds, and This Court Therefore Has No Jurisdiction to Hear the Case

It is well-settled that this Court does not have jurisdiction to hear an appeal from a state Supreme Court that was decided on state law grounds, as this case was. Even if the state courts had addressed a federal issue (which they did not, because none was raised), this Court will not review a decision if it could be supported on the state law grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). This case was decided strictly on the grounds of Pennsylvania procedure as to non-party standing and adequate basis to intervene. There are no federal issues to review.

2. The Petition for Writ of Certiorari Should Be Dismissed as Moot Because There No Longer Is any Case or Controversy in Which to Intervene

On January 13, 1999, at the request of all parties, Hon.

John W. Herron of the Court of Common Pleas of Philadelphia County issued an Order dismissing all claims with prejudice as part of the settlement approval. As there is no case in which to intervene, the instant Petition for Writ of Certiorari should be dismissed as moot.

Once the trial court approved the settlement and entered an order dismissing the litigation with prejudice, there was no longer any actual case or controversy into which Sklaroff could intervene. A court should dismiss a case as moot at any stage, including on appeal, unless an actual case or controversy exists at all stages of the judicial or administrative process. *DeFunis v. Odegaard*, 416 U.S. 312 (1973); *Cytemp Specialty Steel Div., Cyclops Corp. v. Pennsylvania Public Utility Comm'n*, 128 Pa. Commw. 349, 563 A.2d 593, 596 (1989); *Richards v. Trimbur*, 374 Pa. Super. 352, 543 A.2d 116 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989).

This requirement applies to appeals from denials of intervention petitions just as to any other appeal. *See Richards*, 374 Pa. Super. at 359, 543 A.2d at 119 (quashing appeal from denial of intervention after case was voluntarily dismissed). "An intervenor must take the litigation as he finds it," and an appeal from a denial of intervention will be dismissed as moot where the underlying litigation has been terminated. *Pennsylvania Coal Mining Assoc. v. Commonwealth of Pennsylvania*, 498 Pa. 1, 4, 444 A.2d 637, 638 (1982).

3. As Found After Full Review by the Pennsylvania Appellate Courts, Petitioner Asserts No Basis To Question the Sound Discretion of the Trial Court

Even if this Court had jurisdiction to review a state law decision of a state court, Sklaroff has not and cannot satisfy

any criteria for warranting further appellate review of his petition for post-settlement intervention. As any objective reading of the trial court's Opinion reflects, the trial court did not abuse its discretion in denying Sklaroff's post-settlement petition to intervene in the Commonwealth's litigation.[3] The Commonwealth Court, *en banc*, not only affirmed the trial court, but adopted the trial court's Opinion in its entirety.

Sklaroff's Petition fails to address the fundamental finding that Sklaroff did not have standing to intervene under Pa. R.C.P. 2327-2329 in the Commonwealth's settlement of its lawsuit. Sklaroff did not satisfy any of the prerequisites for intervention under those governing rules, including showing any "legally enforceable interest" that would be affected by the litigation, or showing that the post-settlement intervention would not be unduly prejudicial to the parties and to the resolution of their litigation -- a separate basis to deny intervention pursuant to Rule 2329.

These prerequisites for intervention were each discussed at length in the trial court's Opinion, attached as Appendix A to the Petition for Writ of Certiorari, with citations to numerous cases, to wit: the lack of ripeness (Appendix A, at 18-19, 35-37); the purely hypothetical and conjectural nature of the harm alleged (Appendix A, at 28-32); the resulting prejudice to the parties and to the resolution of the litigation (Appendix A, at 41-44); the conclusion that Sklaroff was seeking an improper advisory opinion (Appendix A, at 32), and the conclusion that the relief sought raised a non-justiciable

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[3] *See Pennsylvania Association of Rural and Small Schools v. Casey*, 31 Pa. 439, 442 n.3, 613 A.2d, 1198, 1200 n.3 (1992) ("a trial court will not be found to have abused its discretion [in denying intervention] *unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will")* (citations omitted, emphasis added).

political question (Appendix A, at 38-40). That decision is reviewable only under an abuse of discretion standard.

Sklaroff has never made any pretense of satisfying the requisites for intervention set forth in the Pennsylvania Rules of Civil Procedure and has never provided any basis for challenging the trial court's exercise of discretion, let alone showing any basis for establishing an abuse of that discretion. Sklaroff simply continues to rail against the merits of the MSA. Nor has he even attempted to satisfy (or even identify) any of the articulated considerations in Supreme Court Rule 10 for granting a Writ of Certiorari.

4. The Petition Contains Numerous Misstatements of the Tobacco Settlement and the Course of This Appeal

As he has done at every level, Sklaroff, the self-proclaimed "last anti-tobacco activist who remains erect in America" continues to misstate the terms of the MSA, the course of his appeal, and a variety of extraneous matters. He asserts, for example, that the Commonwealth did not dispute his interpretation of the MSA, including claims such as that the MSA settles future claims of minors. These assertions are irresponsible and inaccurate.

In the interest of brevity, we will not respond to Sklaroff's numerous misstatements, except to note that each of the 46 presiding judges (in each of the 46 settling States), that reviewed and considered the identical MSA, has ***unanimously approved it***, and that every appellate court that has reviewed that approval, has affirmed.

D. CONCLUSION

For the reasons set forth herein, the Commonwealth of Pennsylvania, respectfully urges this Court to deny the petition for Writ of Certiorari.

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Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
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v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

REPLY TO BRIEFS FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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June 28, 2000

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ISSUES PRESENTED

I. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all the Pennsylvania state courts' decisions did **not** rest on "adequate and independent" state law principles.

II. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** satisfied the criteria for standing under Article III of the United States Constitution.

III. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** preserved a federal issue in the Pennsylvania state courts, and **has** raised federal issues in the petition.

IV. Whether the petition presents **many** issues worthy of review by this Court.

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INTRODUCTION

Petitioner Robert B. Sklaroff, MD, respectfully **reinforces** his petition for a Writ of Certiorari to review the judgment of the Pennsylvania Supreme Court in this case.

This document is written in response to submission of the two Briefs by the Respondents, Philip Morris Incorporated ["PM"] and the Commonwealth of Pennsylvania ["CoP"]. Also, it will provide an incremental update regarding the Petitioner's perception of the overall litigation status.

The CoP's Brief was received on the same day this Reply is being generated, so as to **ensure** the Court receives it prior to its summer recess. Pivotal to the capacity to achieve such prompt "turnaround-time" is concomitant submission of the Supplemental Brief, which focuses upon the PM Brief.

The Brief submitted by the CoP raises issues that were predominantly encompassed by that submitted by PM. Also, due to space limitations, other facets thereof will not receive detailed refutation (e.g., "Counter-Statement of the Case").

Direct conversations were held this past week with the attorneys representing both Respondents regarding the Amicus Curiae Brief submitted on June 19, 2000 by the Honorable Jon D. Fox. The goal was to see if either had any opposition to the Court's review of this document, an effort that was intended to facilitate efficient discharge of the judicial process. Both attorneys demurred; the CoP is still reviewing the document and PM hasn't read it yet. The PM attorney said he had been told that Mr. Fox was not presently a member of the Bar of the U.S. Supreme Court, but Mr. Fox reports he was admitted on April 14, 1980 following his having been recommended by CoP Senator Hugh Scott.

The PM Brief reports three states have not yet begun to receive annual allocated payments due to their having achieved state-specific finality by having approved the Master Settlement Agreement ["MSA"]. The legal issues that may pend will be clarified and reported to the Court if they are deemed relevant to those raised in the instant case.

RE-STATEMENT OF THE CASE

The MSA between *inter alia* PM and *inter alia* the CoP was the largest civil litigation settlement in world history. Its obvious defects, however, threaten to protect the Tobacco Industry ["TI"], including PM, against prosecution for current and future misconduct until/unless the deficient clauses therein have been amended or expunged, the consistent goal of Dr. Sklaroff's litigation (and Petition).

The Philadelphia Court of Common Pleas determined that Dr. Sklaroff lacked standing to bring this action because, **at that time**, he was adjudged not to have demonstrated he had a legally enforceable interest. **Since that time**, however, he filed litigation against PM, for two violations of the MSA. Currently, it pends before the Pennsylvania Superior Court. Oral argument was held on June 27, 2000, in Philadelphia.

The Commonwealth Court of Pennsylvania determined that Dr. Sklaroff lacked standing to bring this action because, **at that time**, the particular conduct that had prompted filing of the aforementioned suit against PM had ostensibly ceased. **Since that time**, however, PM has demonstrated recidivism (predicted by Dr. Sklaroff) and comparable conduct has been noted both elsewhere in the CoP and throughout America.

Because he discovered additional violations of the MSA, Dr. Sklaroff then asked the CoP's Attorney General ["AG"] to enforce it. Because the AG **failed** to do so, Dr. Sklaroff filed litigation in Commonwealth Court—acting in its primary jurisdiction—an approach that had been advised in the Opinion of Judge John Herron of the Philadelphia Court of Common Pleas with regard to the Superior Court case. Currently, it pends before the Commonwealth Court. Briefs have been filed, but Oral Argument has not been scheduled.

PM has mischaracterized this effort as frivolous—ignoring Commonwealth Court Judge James Kelley—because it wishes **forever** to enjoy indemnification for future misconduct, in which it already has become engaged. It is believed this outcome will occur if this Petition is denied.

In this Petition, three **Constitutional Amendments** were cited: I ["Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances."]; V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ."]; XIV ["No state shall. . .deprive any person of. . .due process."].

This Court should allow Dr. Sklaroff to work to ensure the MSA does not give unconstitutional levels of immunity to the TI and approve his petition on the grounds that: (1) the Pennsylvania courts' decisions were **not** based on adequate and independent state grounds; (2) Dr. Sklaroff **merits** standing; (3) federal issues **have** been properly presented for review by this Court; and (4) Dr. Sklaroff's petition raises numerous issues **worthy** of this Court's review.

Because all questions raised by the CoP are encompassed by those in the PM's Brief, this Reply Brief addresses only the above. Specifically, the CoP's "Counter-Statement of Basis for Jurisdiction" avers a federal question has belatedly been "manufactured," despite the fact that numerous federal questions have been raised throughout the past 1½ years.

ACCURATE PROCEDURAL HISTORY

On April 23, 1997, the AG of the CoP filed litigation against the TI seeking damages, recovery of Medicaid and other medical payments and injunctive relief [*Commonwealth of Pennsylvania v. Philip Morris Incorporated,* No. 2443 (Philadelphia County Ct. C. P. Ap. 23, 1997)]. It is **not** true, however, that the subsequently-negotiated MSA forced the TI "to pay the CoP $11.26 billion over the next 25 years" because this calculation was subject to various adjustments that have, already, decreased the annual allocated payment. It is **not** true, also, that the TI "agreed to numerous restrictions that otherwise could not have been imposed by court order," inasmuch as comparable restrictions had indeed resulted from prior state-level tobacco-related litigation (e.g., the Minnesota settlement banned payment to media for product placement).

Anti-tobacco activists in the CoP, including Dr. Sklaroff, immediately challenged the MSA's approval in 1998. It is **not** true that they were "not opposing the negotiation or conclusion of the MSA," inasmuch as they emphasized, in the concluding paragraph of the initial Common Pleas Court Brief, the fact that they had been excluded from this process:

> Until November of 1998, just before the MSA made the transition from secret to public, the Attorney General assured Petitioners that they had nothing to worry about, and that their goal would be achieved. It was only upon the publication of the previously guarded MSA provisions, when Petitioners learned that their interests had been sacrificed in favor of the tobacco defendants' desire for immunity. At that point, the petitioners knew they were harmed, and they acted promptly.

The Herron Opinion, indeed, cited *PRCPs 2326-2329, Pennsylvania Crime Commission Subpoena,* 309 A 2d 401 (Pa. 1973) and *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992) in rejecting the provision of standing, but it is **not** true that Federal Constitutional issues were not prominent therein. Indeed, immediately following the aforementioned citations, Judge Herron "climaxed" thusly:

> In analyzing whether a particular case presents such a non-justiciable political question, the Pennsylvania Supreme Court has repeatedly emphasized the criteria set forth by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

He then cited *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) and, in footnote #74, cited additional cases thusly: "The Pennsylvania Supreme Court has relied on the *Baker v. Carr* analysis in other cases where it considered whether a particular case presented a nonjusticiable political question." The root forces invoked when interpreting this entire case were framed in a **federal** context at the start of the process.

In all his appeals, "Dr. Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly." It is **not** true that this was the **sole** basis for these efforts, for this **federal** concern is in prior filings, plus the Writ:

> The petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—should not be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and **federal** law, based upon his current and future civil and due-process constitutional rights.

Dr. Sklaroff's Petition elucidated myriad reasons why he *inter alia* merits standing; it is **not** true that this is a meritless or irrelevant argument, inasmuch as Judge Kelley validated applying such concerns to others excluded from this process.

Dr. Sklaroff's Petition cited a "subsequent lawsuit against PM." It is **not** true that it is "completely separate from this case and is not a part of the record here," because it has been **included** in the record (at multiple sites) and has been **cited** throughout the appellate process as illustrative of the legally enforceable interest invoked to yield "standing."

Dr. Sklaroff seeks "required judicial review of the MSA."

SUMMARY OF ARGUMENTS

This Court should grant a Writ of Certiorari in this matter for the following reasons. First, the CoP courts' decisions that are the subject of Dr. Sklaroff's petition did **not** turn on adequate and independent state grounds. Second, Dr. Sklaroff **has** alleged the requisite standing to bring this petition under Article III of the U.S. Constitution. Third, Dr. Sklaroff's petition raises numerous **federal** issues that have been properly preserved for review by this Court. Finally, Dr. Sklaroff's petition raises issues **worthy** of this Court's review. Thus, this Court should accept the petition.

REASONS FOR APPROVING THE WRIT

I. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles.

PM cited four cases in order to support the view that the Writ should not be issued because the state-level adjudication had been "adequate and independent." [*ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Coleman v. Thompson,* 501 U.S. 722 (1991), *Herb V. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).]

Each citation, however, was **incomplete** and the facts of this case undermined PM's intended conclusion. Therefore, prior opinions in this case were, admittedly, not predicated only on "adequate and independent" state-level grounds.

II. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where the Petitioner has satisfied the criteria for standing under Article III of the United States Constitution.

PM cited eight cases in order to support the view that the Writ should not be issued because of the absence of standing. [*ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), *Flast v. Cohen,* 392 U.S. 83 (1968), *Gladstone, Realtors V. Village of Bellwood,* 441 U.S. 91 (1979), *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., et al.,* 454 U.S. 464 (1975), *Warth v. Seldin,* 422 U.S. 490 (1975).]

Each citation, however, was **incomplete** and the facts of this case undermine PM's intended conclusions. To aver the converse of PM's assertion, Dr. Sklaroff has standing based both upon federal and state criteria.

III. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition.

The Briefs and Opinions in this case include federal citations of specific cases and statutes that were invoked in the state court system, but the interpretation of which is now subject to review by the U.S. Supreme Court.

The cases include: *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999); *Georgine et al v. Amchem Products, Inc. et al.*, 83 Fed 3rd 610; *Hawaii v. Standard Oil Company*, 405 U.S. 251, 257 (1972); *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 65 Fed 3rd 768; *In re: Washington Public Power Supply System Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz. 1989), *aff'd Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992, *cert. Denied*, 506 U.S. 953; *Reverend Jessie Brown, et al. v. Philip Morris, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 98-5518; and *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981). The statutes include 42 U.S.C. 1981 & 1982, and 42 U.S.C. 1981.

The pleadings and the opinions rendered in this case have fundamental **federal** underpinnings; furthermore, state-level interpretations of such issues as due process were predicated on **federal** law. PM admitted the Petition was "premised **almost** exclusively on interpretations of Pennsylvania state law" ["Counter-Statement of the Case"] thereby admitting it included interpretations of non-state (**federal**) law.

PM's legal citations corroborate the view that Dr. Sklaroff's appeal has properly posed fundamental federal issues for consideration by the Court.

PM cites the fact that, except in rare instances, the Supreme Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83 (1997).

Unlike *Adams*, however, the instant case fits key criteria: (1) federal due process claims were raised initially and subsequently by citing the Constitution (rather than simply relying upon citation of the words "due process"); (2) discussion of federal cases was not immersed in unrelated argument [citing *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987), *vide infra*]; (3) no court could fairly have read these citations (both individually and in the aggregate) as merely referencing narrow state-level questions; (4) specific reference has been made to the places in the record where the matter appears [Supreme Court Rule 14.1(g)(i)]; (5) the minimum requirement was met that a federal claim was presented [*Webb v. Webb*, 451 U.S. 493, 496-497, 501 (1981) & *Bowe v. Scott*, 233 U.S. 658, 664-665 (1914)] and (6) there can be no doubt that **federal** issues were raised when the statement of the first question posed under the Petition specifically cited **federal** due process.

PM cites *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987) to support its view that "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " In the instant case, as noted earlier, Dr. Sklaroff could not force the CoP Supreme Court to rule; thus, its judgment was directly derived from that of the Commonwealth Court which had weighed **federal** issues.

Thus, **federal** issues permeated the initial complaint, appeals generated therefrom, opinions derived therefrom and the proper presentation of this case at both the state and federal levels. The characteristics thereof meet all legal citations provided by PM, and necessitate rectification by the U.S. Supreme Court.

IV. The petition presents many issues worthy of review by this Court.

In the Supplemental Brief, an elaborative rejoinder was provided to this argument by PM. Rather than summarizing the myriad concerns raised in this litigation, the focus of this Reply Brief will be upon both the content and the tone of the CoP's Brief. For example, aspersions were cast therein, such as reference to litigation filed by Dr. Sklaroff after he was denied due process rights by an organization that had used him to silence opposition raised by the hospital medical staff. That the CoP's AG has filed suit against this entity should serve to illustrate that Dr. Sklaroff's goal was to gain court recognition of that organization's cavalier approach to the common rule of law (in his case, the Medical Staff Bylaws). [*Robert B. Sklaroff, MD v. Allegheny Health Education and Research Foundation, et al.*, 1996 W.L. 665519 (E.D. Pa. Nov. 12, 1996), *aff'd without opinion*, 118 F.3d 1578 (3d Cir. 1997)]. Nevertheless, the CoP cannot claim "frivolity" in this case because *inter alia* of the existence of the cogent Minority Opinion of Commonwealth Court Judge Kelley.

Specific reference must be made to the issue of mootness [the CoP's point #2] inasmuch as the incredible claim seems to be made that any degree of finality occurred in a lower court that is presently not subject to the adjudication of the U.S. Supreme Court. It is stated that "there is no case in which to intervene" because of the dismissal of all claims with prejudice by Judge Herron, despite the fact that the unchallenged litigation history clearly encompasses appellate review of all prior actions in the CoP related to the MSA.

Finally, the CoP raises the "abuse of discretion" criterion as an absolute bar from appellate review by this Court, despite the fact that it is a legitimate issue to be raised. Again illustrating how the Settling Parties would not wish reference be made to the pending litigation against PM, standing is argued not to exist because of the lack of any type of "legally enforceable interest"; it would be far more intellectually honest were either Settling Party to address the unassailable existence of this litigation (and argue whether it is somehow not applicable) rather than to engage in denial.

The CoP disdainfully states Dr. Sklaroff "has never made any pretense of satisfying the requisites for intervention set forth in the Pennsylvania Rules of Civil Procedure," ignoring the fact that these have continuously driven his arguments. Further, the CoP states "Sklaroff simply continues to rail against the merits of the MSA," despite the fact that he has raised only two key concerns (immunity and offset) therein.

Finally, the CoP charges that Dr. Sklaroff's Petition "contains numerous misstatements of the Tobacco Settlement and the course of this appeal" while providing but one example thereof ["The Commonwealth did not dispute his interpretation of the MSA, including claims such as that the MSA settles future claims of minors. These assertions are irresponsible and inaccurate."] Dr. Sklaroff's briefs document this assertion, both in the Common Pleas Court representations and in contemporaneous public statements. Indeed, he has repeatedly offered to withdraw his litigation were the CoP's AG merely to stipulate any such quotations. Such efforts to settle this litigation, however, have been constantly (and arrogantly) rebuffed (privately and publicly).

CONCLUSION

Therefore, Robert B. Sklaroff, MD requests remand of the MSA to the CoP's Philadelphia Court of Common Pleas.

Respectfully submitted,

Robert B. Sklaroff/MD

(6)

No. 99-1852

Supreme Court, U.S.
FILED
JUL 13 2000
CLERK

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

SUPPLEMENTAL BRIEF - I IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 27, 2000

16pp

ISSUES PRESENTED

I. **Whether this Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles.**

Answered in the Affirmative in this Document

II. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** satisfied the criteria for standing under Article III of the United States Constitution.

Answered in the Affirmative in Addendum-II

III. **Whether this Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition.**

Answered in the Affirmative in this Document

IV. Whether the petition presents **many** issues worthy of review by this Court.

Answered in the Affirmative in Addendum-II

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The Petitioner satisfied **all** standing criteria because all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles; also, the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition. Exhaustive review of federal issues raised in the Reply Brief filed by Philip Morris Incorporated ["PM"] is excluded from this brief; rather, its ambit is focused upon refuting the intended effects of the selective-quotations contained therein. [Thus, it is limited to newly-raised issues in its "I" & "III."]

Each citation was **incomplete**, and the facts of this case undermine PM's intended conclusions. Thus, this brief will cite each case as had PM, then quoted in-depth, next applied within the context of the instant case, and finally shown to support the Petition for a Writ of Certiorari of Dr. Sklaroff.

PM cited the following four cases: *ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Coleman v. Thompson,* 501 U.S. 722 (1991), *Herb v. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).

a. The *ASARCO* Case Supports Dr. Sklaroff.

ASARCO was quoted as having stated, "the state courts are not bound to adhere to federal standing requirements." No effort, however, had been made to invoke these criteria in any submission by Dr. Sklaroff at any time to any court. Nevertheless, a more complete analysis of this opinion yields additional insight into why Dr. Sklaroff **does** merit standing.

In *ASARCO*, the U.S. Supreme Court ruled in favor of **the petitioners** because "This Court has jurisdiction. . . ; [the lower court] had issued a final judgment; there is standing and an actual case or controversy that permits [of] a decision in federal court; and . . .the decision below is reviewable because it does not rest on an adequate and independent state ground." The focus is upon § II-C: "References to the Arizona Constitution simply reflect a holding which rests on the state court's interpretation of federal law."

From its inception, this case was framed federally. The Petitioners' Brief cited Article I of the U.S. Bill of Rights—inasmuch as the Petitioners were petitioning government—and grammatically severed this argument from subsequent citation of a "state"-related concern (in the same sentence):

> Against this background, Petitioners' position in this litigation is that the release provisions of the MSA effect an unconstitutional deprivation of Petitioners' **right** of access to the courts, and that the indemnity provisions of the MSA, by which the citizenry indemnifies the tobacco companies even for awards of punitive damages, are directly contrary to the public policy of the State which expressly forbids insurance against such liabilities.

The Commonwealth Court's terse Majority Opinion summarized its rationale for adopting a dismissive approach in one sentence (which Dr. Sklaroff extensively parsed and discounted thereafter through subsequent appellate efforts) devoid of references. Dr. Sklaroff could not compel it to cite federal law, despite prior references thereto that appeared in the Petitioners' Brief plus concomitant citations thereof that permeated Judge Kelley's Minority Opinion.

Indeed, the Minority Opinion didn't cite the CoP Constitution (in a broad context); it cited (in other contexts) analyses of other states' constitutions. (Naturally, most of its case-citations were derived from the CoP.) PM asserted **incorrectly** this Court "did not address any federal issues" in its "Counter-Statement of the Case, one of the many errors therein that are corrected in the Petitioner's Reply Brief.

Judge Kelley started his analysis by citing **a federal case**: "However, the contractual nature of a consent decree does not affect the judicial character of a court's acceptance of the decree or its imposition of judgment thereon. Indeed, "[i]t is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act'." *Pope v. United States*, 323 U.S. 1, 12 (1944)

ARASCO said: "Although the Arizona Supreme Court was free to rest its holding on the State Constitution as an independent ground, the decision below did not divorce the state constitutional issue from the questions of federal law."

Similarly, the Herron Opinion had referred to Article V of the U.S. Bill of Rights when portraying the Petitioners' views, as distinct language from the CoP Constitution:

> They assert, for instance, that their **constitutionally protected right of access to the courts and their right to be free from governmental taking of property without due process or just compensation** would be violated by such a sweeping interpretation of the MSA.

Thus, the *ASARCO* case demonstrates that the Petition should be accepted because it more than satisfies the specific criteria articulated therein, with particular reference to the need to have judicable arguments based upon **federal** law.

b. The *Coleman* Case Supports Dr. Sklaroff.

This is a *habeas corpus* case that includes the following quotation, per PM's Brief: "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." Ignored, however, is the clear distinction ("with a difference") made by the Court: "The basis for application of the independent and adequate state ground doctrine in federal *habeas* is somewhat different than on **direct** review by this Court. . . .The Court does not review a judgment [in a *habeas* case], but the lawfulness of the petitioner's custody simpliciter." [reference omitted]

Thus, the *Coleman* case demonstrates that the Petition should be accepted because citing this doctrine (even in this context) does not defeat the necessity for Court review of the MSA based upon both state and **federal** law. PM's citation merely is of a truism, rather than of a defect in the Petition.

c. The *Herb* Case Supports Dr. Sklaroff.

PM accurately quoted the essence of this case thusly: "[this Court's] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." The Court, however, found the situation ambiguous because "The Supreme Court of Illinois did not decide whether under the State Constitution the Venue Act was unconstitutional, apparently because it held the Act not to apply." Therefore, it held the case in abeyance until the Supreme Court of Illinois had determined whether any federal issues had been weighed in the adjudication thereof.

This choice of disposition would provide an alternative in unclear cases, but subsequent opinions supersede it.

Thus, the *Herb* case demonstrates that the Petition should be accepted because it is deemed **necessary** for the federal judiciary to correct a state court's error in interpreting federal law related to honoring the Petitioner's due process rights.

d. The *Michigan* Case Supports Dr. Sklaroff.

Again, PM accurately quotes the essence of the opinion: "When a state court decision fairly appears to rest primarily on federal law, or [appears] to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." The Court will neither try to interpret state law nor await clarification.

The next sentences remove all remaining ambiguity: "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

"In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." No such phrase appears in any opinion rendered in the MSA's adjudication process in the CoP.

Three **Constitutional Amendments** were cited in this Petition,: I ["Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances."]; V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . .]; XIV ["No state shall. . .deprive any person of. . .due process."]. The CoP Constitution was also cited in the Petition.

Thus, the *Michigan* case demonstrates that the Petition should be accepted because citation of three Articles in the U.S. Bill of Rights yields an undeniable **federal** component to the litigation history of the instant case, even if it is felt to be interwoven with state-level interpretations of due process.

e. The Briefs and Opinions in this case include federal citations of specific cases and statutes that were invoked in the state court system, but the interpretation of which is now subject to review by the U.S. Supreme Court.

The Herron Opinion cited *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) and, in footnote #74, cited additional cases thusly: "The Pennsylvania Supreme Court has relied on the *Baker v. Carr* analysis in other cases where it considered whether a particular case presented a nonjusticiable political question." The root forces invoked when interpreting this entire case were framed in a **federal** context at the start of the process.

Discussion of class action litigation in numerous briefs cited two **federal** cases: *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 65 Fed 3rd 768 & *Georgine et al v. Amchem Products, Inc. et al.*, 83 Fed 3rd 610.

The Appendix to the Petitioners' Brief cited a **federal** case: *Reverend Jessie Brown, et al. v. Philip Morris, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 98-5518. . .a **federal** race discrimination case brought under the **federal** Civil Rights Act of 1866, 42 U.S.C. 1981 and 1982, and other statutes.

Judge Kelley's analysis included citation of a *parens patriae* reference in a **federal** case [footnote #24: *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999)].

The Petitioner's posture is illustrated by this citation from the Writ, drafted prior to knowledge of PM's critique:

> d. Constitutional Concerns.
>
> **Blocking Dr. Sklaroff and the Activists from intervening denies them due process (under the 1st, 5th and 14th Amendments) and equal protection (under the 14th Amendment** and the PA Constitution's Declaration of Rights).
>
> In the latter (Article I), for example, Section 1 deals with the Inherent Rights of Mankind, Section 20 deals with the Right of Petition, and Section 25 deals with Reservation of Powers in People. The class action and civil rights of many future putative litigants have been violated in this matter.

As anticipated, a **federal** court filing by PM on 3/31/99 raised the MSA as an affirmative (11th) defense for present and future actions. *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999). PM also invoked the MSA in its Preliminary Objections to the current filing against the Wawa Billboard Advertising.

In addition to his "Wawa" cases against PM and the CoP AG, Dr. Sklaroff articulated two causes-of-action based upon tax-related implications of the MSA justifying a taxpayer suit.

> These causes-of-action are as follows. One would block the Tobacco Industry from making settlement monies tax-deductible. The second would block the Tobacco Industry from invoking Section X ["Effect of Federal Tobacco-Related Legislation"] to invoke "a continuing dollar-for-dollar offset" against the annual payments by the TI to the state were Congress to increase excise taxes, as the MSA depicted in complicated legal language.

Such **federal** litigation could be filed by Dr. Sklaroff.

Judge Kelley analyzed *parens patriae* litigation thusly:

> As the **United States Supreme Court** has noted: The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal Prerogative." These powers and duties were said to be exercised by the King in his capacity as "father of the country." Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics" and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "*parens patriae*" function of the King passed to the States. The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. *Hawaii v. Standard Oil Company*, 405 U.S. 251, 257 (1972)

In all his appeals, "Dr. Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly." It is **not** true that this was the **sole** basis for these efforts, for this **federal** concern is in prior filings, plus the Writ, and is distilled as a **particular question** that was posed throughout:

> The petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—should not be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and **federal** law, based upon his current and future civil and due-process constitutional rights.

Other state-level cases (from around the country) were cited in the Petitioner's Briefs. For example: "The Court was required to weigh the merits of the MSA to ensure it was fair, reasonable and adequate." *In re: Washington Public Power Supply System Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz. 1989), *aff'd Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992, *cert. Denied*, 506 U.S. 953.

It its "Counter-Statement of the Case," PM admitted that the Writ is "premised **almost** exclusively on interpretations of Pennsylvania state law." It thereby **admitted** it includes interpretations of applicable non-state law, i.e. **federal** law.

PM was disingenuous when it argued this case lacks **federal** underpinnings, recalling this disinterested depiction of how it was responsible for a state-focused case-critique:

> Both the Commonwealth and the Tobacco defendants are careful not to address these substantive arguments in their memoranda. Rather, they suggest that such [federal] arguments are premature. {from Judge Herron's Opinion}

Thus, the pleadings and the opinions rendered in this case have fundamental **federal** underpinnings; furthermore, the state-level interpretations of such issues as due process were predicated on **federal** law.

f. PM's legal citations corroborate the view that Dr. Sklaroff's appeal has properly posed fundamental federal issues for consideration by the Court.

PM notes this Court has usually "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83 (1997).

PM admits that in *Adams*, a Writ of Certiorari was dismissed "where petitioner, although raising certain due process arguments before the Alabama Supreme Court, failed to raise the due process challenge contained in the petition." In the instant case, this was certainly not the case.

Key characteristics of what has to have been alleged are contained in *Adams*, criteria that specifically were not met by the Petitioner in that case but which have been met herein. Referencing the "patter" of prior citations, it must be noted that they show incontrovertible evidence of the following: (1) federal due process claims were raised initially and subsequently by citing the Constitution (rather than simply relying upon citation of the words "due process"); (2) discussion of federal cases was not immersed in unrelated argument [citing *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987), *vide infra*]; (3) no court could fairly have read these citations (both individually and in the aggregate) as merely referencing narrow state-level questions; (4) specific reference has been made to the places in the record where the matter appears [Supreme Court Rule 14.1(g)(i)]; (5) the minimum requirement was met that a federal claim was presented [*Webb v. Webb*, 451 U.S. 493, 496-497, 501 (1981) & *Bowe v. Scott*, 233 U.S. 658, 664-665 (1914)] and (6) there can be no doubt that **federal** issues were raised when the statement of the first question posed under the Petition specifically cited **federal** due process.

PM cites *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987) to support its view that "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " In the instant case, as noted earlier, Dr. Sklaroff could not force the CoP Supreme Court to rule; thus, its judgment was directly derived from that of the Commonwealth Court which *supra* weighed **federal** issues.

Thus, **federal** issues permeated the initial complaint, appeals generated therefrom, opinions derived therefrom and the proper presentation of this case at both the state and federal levels. The characteristics thereof meet all legal citations provided by PM, and necessitate rectification by the U.S. Supreme Court.

Ultimately, PM argues that Dr. Sklaroff failed to preserve a federal issue for adjudication by the U.S. Supreme Court, despite the fact that this "thread" that ran through all Briefs resembled, rather, a "rope" that it continues to shun. Indeed, that PM has avoided dealing with these fundamental issues does not minimize their importance, as PM would wish.

PM failed to cite a shred of evidence that linked **this** case with those upon which its Brief had been predicated. Indeed, its four citations support the Petitioner, for this matter has many links to federal law and cases, *vide supra et vide infra.*

This Court should grant a Writ of Certiorari in this matter for the following reasons. First, the state courts' decisions that are the subject of Dr. Sklaroff's petition did **not** turn on adequate and independent state grounds. Second, Dr. Sklaroff's petition raises numerous **federal** issues that have been properly preserved for review by this Court.

And, for these reasons, Dr. Sklaroff's Petition for a Writ of Certiorari must be honored by the U.S. Supreme Court.

Respectfully submitted,

_____

Robert B. Sklaroff, MD

Supreme Court, U.S.
FILED
JUN 19 2000
CLERK

No. 99-1852

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, ET AL.,

Respondents.

SUPPORTING The Petition For A Writ Of Certiorari
To The Pennsylvania Supreme Court

AMICUS CURIAE BRIEF
BY THE HONORABLE JON D. FOX, ESQUIRE

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June 19, 2000

10PP

AMICUS CURIAE BRIEF
BY THE HONORABLE JON D. FOX

The Honorable Jon D. Fox, Pennsylvania Congressman from 1994 until 1998, hereby submits this *Amicus Curiae* Brief in support of Petitioner Robert B. Sklaroff, MD[1], pursuant *inter alia* to Rule 37.

MOTION

1. Inasmuch as insufficient time existed to acquire formal consent from the Settling Parties for filing of this Brief, a motion has been prepared as if consent has been denied; consent will be requested from these Parties and the Court will be noticed (through filing of a Supplemental Brief) regarding the outcome.

2. Mr. Fox has served at numerous levels of government during the past three decades (Assistant District Attorney, Township Commissioner, State Representative, County Commissioner, and Congressman); therefore, he has gained significant and unique experience and expertise with particular regard to the appropriate exercise of governmental power.

3. The specific issues discussed in this Brief relate to the anticipated capacity of governmental entities to assert their rights on behalf of those they represent, plus how these responsibilities may be compromised if the Master Settlement Agreement is not modified.

4. Therefore, Mr. Fox respectfully requests that this Brief be accepted into the record.

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[1] This document was written in-part by Dr. Sklaroff, who financed its reproduction and submission; no other person, entity or organization contributed either to its authorship or to its preparation.

INTEREST OF MR. FOX

During his career, Mr. Fox has viewed government's chief roles as being Protector of and Guide for the Citizenry. Therefore, he would like the Master Settlement Agreement (effected between the Commonwealth of Pennsylvania and the Tobacco Industry) to ensure all governmental entities retain the capacity to assert rights of citizens they represent.

SUMMARY OF THE ARGUMENT

The Master Settlement Agreement must be amended by deletion of ¶ II (nn) and ¶ II (pp) for two reasons. First, regarding ¶ II (nn), no person or entity should be immunized with regard to future conduct of any type. Second, regarding ¶ II (pp), no governmental entity in Pennsylvania should be precluded from asserting the rights of citizens it represents.

As noted in the Writ, immunizing the Tobacco Industry with regard to future conduct is *ultra vires*, unprecedented, overly broad, complex, excessively ambiguous, and inconsistent with public policy. ¶ II (nn) should be deleted.

The Pennsylvania Attorney General is not empowered to indemnify any entity against litigation filed either by the Commonwealth of Pennsylvania or by its agents, officials, representatives, agencies, departments, commissions, divisions and subdivisions. ¶ II (pp) should be deleted.

The focus of this *Amicus Curiae* Brief is on the latter; attention will be given to the concerns expressed during 1999 by Philadelphia and Allegheny Counties for their citizens. Emphasized is the capacity of other states (California and New York) to have recognized existence of tobacco-related expenses incurred by governmental subunits and to have ensured that monies generated by the Master Settlement Agreement have been appropriated in a fashion consistent with the intent of the original Medicaid-based litigation. Assertion of such rights by counties led to a proper outcome; all of Pennsylvania's governments must be so-empowered.

ARGUMENT

1. Introduction

Dr. Sklaroff's Writ of Certiorari represents the last opportunity to **stop** the American legal system from placing its imprimatur on the Master Settlement Agreement without first establishing safeguards for the future. His ability to achieve standing to address key facets thereof will also determine whether other governmental entities, in addition, will be afforded the chance to improve this document.

Dr. Sklaroff has outlined multi-level issues that merit serious consideration including, in particular, concerns regarding the necessity to ensure the rights of all non-settling parties are honored in the process. This is consistent with the perspective articulated in the Minority Opinion authored by Commonwealth Court Judge James R. Kelley.

The focus of this Brief will be upon why the two counties with the largest populations in the Commonwealth have rights and responsibilities that have not been validated through this process, and that **should** be heard by the Court.

Four documents have been appended to this *Amicus Curiae* Brief, each elucidating a key facet of this litigation. The "Brief of the City of Philadelphia as *Amicus Curiae*" was filed in conjunction with the instant case; it was argued during the same two hearings (January 8 & 12, 1999) during which the filing by *inter alia* Dr. Sklaroff was analyzed.

A letter sent by Philadelphia Mayor Edward G. Rendell to Pennsylvania Attorney General D. Michael Fisher on December 3, 1998 elucidated the City's concerns. A letter sent by Dr. Sklaroff to Mayor Rendell on August 1, 1999 articulated the legal underpinning of the rationale to involve the City of Philadelphia in this litigation.

Testimony submitted by Dr. Sklaroff to Philadelphia City Council on May 24, 2000 regarding the Master Settlement Agreement articulated the rationale for empowering a governmental sub-unit to assert the rights of its citizens.

2. The County Perspective

The City of Philadelphia and the County of Allegheny have expressed concern regarding the MSA's far-reaching immunity clauses. Both viewed their interests as unaffected and, thus, both chose not to pursue the case to its legal terminus. The former expressed these views through an *Amicus Curiae* brief that was filed contemporaneous to oral argument in January 1999; the latter expressed these views through pursuit of an appeal to the Commonwealth Court. Also, counties (e.g., in Arizona) filed claims throughout America seeking reimbursement for tobacco-related costs; as a result, those in some states (e.g., New York and California) gained a sizable portion of annual MSA-generated allocated monies. This process led—legally and operationally—to recognition that the status of counties was **distinct** from that of the states in which they were located.

Pennsylvania is no different, and merits comparable mechanisms of recompense. [Indeed, Pennsylvania got half of the per-capita money as was received by the first four settling states (Mississippi, Florida, Texas and Minnesota). They also did not have to provide any future immunity to the tobacco companies, as Pennsylvania has been forced to do.] County governments incur distinct tobacco-related costs that cannot now be recovered (either from the Commonwealth or from the tobacco industry) except through indirect methods.

Briefs filed by the County of Allegheny and by the City of Philadelphia addressed both sides of this "coin," in that the former detailed its major categories of tobacco-related expenditures (e.g., health care clinics) and the latter focused on why it should be able to sue for any type of civil liability (e.g., non-self-extinguishing cigarettes that cause fires).

As was true with the non-governmental entities that suddenly discovered the MSA threatened their rights, these governmental sub-units found themselves subject to a legal hurdle from which they wanted prospective **exemption**. Clarification of this matter is pending.

3. Philadelphia

The City of Philadelphia determined that it was not a party to the MSA through a four-part "proof." The complete text of its filing has been appended hereto [Appendix A] because the arguments contained therein must be updated.

First, the City stated that it had the right to file an *Amicus Curiae* brief, an action that was not challenged by any party. Second, the City stated it considered filing an intervention petition improper for one reason [page 15, emphasis added]: "If indeed the defendants to this action felt that the claims of the City of Philadelphia are to be released by approval of this agreement, they had an opportunity, indeed, an **obligation** to file a petition for interpleader to bring the City of Philadelphia into the case as a party."

Because no such document was filed, the key rationale for the City's conclusion has been undermined. This is a three-step proof using a classic syllogism: "If P then Q." "Not Q." THEREFORE "Not P." The certainty that the City is not a party no longer exists (indeed, if it ever existed).

Third, the City concluded the Attorney General does **not** have the authority to release claims on behalf of the City, but it failed to recognize (as had been predicted in the letter sent by Dr. Sklaroff to the Mayor in August, 1999) the capacity of the Legislature to shake this level of confidence, later on.

Just a few days ago, in mid-June, 2000, the Pennsylvania Legislature passed House Bill 445, ostensibly intended to establish a policy regarding Non-Participating Manufacturers [pursuant to Exhibit T in the MSA]. Unfortunately, it also passed introductory language (that will, presumably, be signed into law by the Governor any day now) that could be invoked by the tobacco industry as expressing "intent" to be indemnified, not withstanding the presumed limits of power by the Attorney General to afford any entity such immunity. Specifically, it recognized the fact that MSA-monies were acquired in return for the granting of indemnification (http://www.legis.state.pa.us/WU01/LI/BI/ALL/1999/0/HB0445.HTM).

It omitted, however, the disclaimer that the Attorney General said should suffice without the need for a stipulation [i.e., that immunity was granted "to the full extent of the power of the signatories to release past, present and future claims"]. This key facet of the legislation is as follows:

> (5) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the Commonwealth. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present and certain future claims against those manufacturers as described therein, to. . .

Thus, Dr. Sklaroff testified before the Courts Subcommittee of the Pennsylvania House Judiciary Committee, asking that this phrase be deleted, inasmuch as its absence wouldn't affect the impact of the bill. Because this effort inexplicably failed, the tobacco industry can now argue that the Attorney General has been empowered to grant it "stealth immunity."

Fourth, the City concluded the Court should **require** the parties to clarify their position on the scope of the release. This was requested "in the interest of the public good [because] this Court is empowered to demand that the parties to the Agreement clarify their respective interpretations for the record." This plea, however, was not honored.

These issues had been cited in the letter previously sent by Mayor Rendell to the Attorney General [Appendix B]:

> Foremost among the City's concerns is the extent to which the Agreement purports to extinguish the rights of local governments to assert claims for monetary and injunctive relief against the tobacco industry defendants. As you know, under well-settled Pennsylvania law, the Commonwealth cannot extinguish the legal rights of Pennsylvania local governments to seek redress for harms and losses caused by tobacco products without formal legislative action.

> In addition, the draft agreement purports to release the tobacco industry defendants from liability for damages for future conduct, acts or omissions related to the use of or exposure to tobacco products. If the Agreement binds local governments to any degree, it is problematic to the City that [this] Agreement could be interpreted as insulating the tobacco industry defendants from liability for future misconduct.

In a letter subsequently sent to the Mayor [Appendix C], Dr. Sklaroff updated this issue, based upon a point-by-point response to the City's *Amicus Curiae* brief. The inescapable conclusion here is that a county government's core concerns still remain inexplicably **unclarified** by the settling parties at the level of the United States Supreme Court.

Thus did the City articulate fundamental forces that have driven Dr. Sklaroff's litigation. The only recourse available currently to achieve such clarification is through stipulation, and the only method available to acquire binding language is through remand to the Philadelphia Court of Common Pleas.

4. Allegheny County

Allegheny County filed a brief with Commonwealth Court supporting its appeal of having been denied standing. Therein, two ways the MSA empowers state government to facilitate the tobacco industry in limiting future litigation were articulated (pages 29-30). Because the Commonwealth has retained and/or claimed the right to approve any future settlement which others might reach in their own right, it has potentially interposed a previously non-existent defense to lawful pursuit of collective claims. And the Commonwealth has agreed not to assist or encourage (directly or indirectly) "any challenge to the [MSA] or any Consent Decree by any other person, and will support the integrity and enforcement of the terms of the Agreement and the Consent Decrees."

The tobacco industry has thus precluded government from voicing future concerns on behalf of the citizenry.

No opinion issued in this matter has scrutinized the MSA to the degree necessary to "reach" assessment of such basic considerations as these. Furthermore, Allegheny County withdrew its Commonwealth Court appeal before its merits could be reviewed (beyond Judge Kelley's Opinion).

The Commonwealth Court permitted this withdrawal to occur absent submission of a proper application—violations of procedure detailed by Judge Kelley—but the PA Supreme Court denied Dr. Sklaroff's Petition for Review of this particular issue. In any case, concerns raised by Allegheny County will also remain unresolved until/unless they are aired following remand to the Court of Common Pleas.

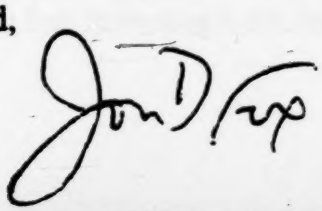
5. Implications

Dr. Sklaroff recently testified before Philadelphia City Council with regard to the proper disposition of MSA-related monies (from both state-wide and county-level perspectives). Therein, he detailed a comparable point-by-point response to the City's initial *Amicus Curiae* brief, again concluding that supporting this legal effort was the only way the City could be assured a myriad of under-funded Medicaid-related projects would receive long-term support through the MSA. Indeed, such argument remains unrefuted [Appendix D].

CONCLUSION

The Writ of Certiorari filed by Robert B. Sklaroff, MD must be **granted** because fundamental Constitutional issues related *inter alia* to the rights and responsibilities of counties (governmental sub-units) should be heard in court prior to their implementation via the Master Settlement Agreement.

Respectfully Submitted,



APPENDIX

Due to space-limits [20 pages for an *Amicus Curiae Brief*], these documents have been reformulated as "Lodging #2."

A. Brief of the City of Philadelphia, as *Amicus Curiae*

B. Letter by Edward G. Rendell, Mayor of Philadelphia

C. Letter by Robert B. Sklaroff, MD

D. Testimony by Robert B. Sklaroff, MD